CHRISTIAN SOLER

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STANFORD UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
STANFORD, CA 94305-6032

Name: Soler,Christian Daniel
Student ID: 06320803

Johanna Metzgar
Registrar

Print Date: 11/14/2022

-------- Stanford Degrees Awarded --------

Degree : Doctor of Jurisprudence
Confer Date : 06/12/2022
Plan : Law

-------- Academic Program --------

Program : Law JD
09/23/2019 : Law (JD)
Completed Program

-------- Beginning of Academic Record --------

2019-2020 Autumn

Course		Title	Attempted	Earned	Grade
LAW	201	CIVIL PROCEDURE I Shirin Sinnar	5.00	5.00	P
LAW	205	CONTRACTS George Triantis	5.00	5.00	P
LAW	219	LEGAL RESEARCH AND WRITING Jeanne Merino	2.00	2.00	H
LAW	223	TORTS Nora Engstrom	5.00	5.00	P
LAW	240B	DISCUSSION (1L): COMPARATIVE APPROACHES TO LAW AND INEQUALITY Amalia Kessler	1.00	1.00	MP

2019-2020 Winter

Some winter LAW courses graded MPH/F (Mandatory Pass-Health) due to pandemic.

Course		Title	Attempted	Earned	Grade
LAW	203	CONSTITUTIONAL LAW Bernadette Meyler	3.00	3.00	MPH
LAW	207	CRIMINAL LAW Lawrence Marshall	4.00	4.00	MPH
LAW	224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK Lara Hoffman	2.00	2.00	MPH
LAW	6004	LEGAL ETHICS: THE PLAINTIFFS' LAWYER Nora Engstrom	3.00	3.00	H

2019-2020 Spring

All spring LAW courses graded MPH/F (Mandatory Pass-Health) due to pandemic.

Course		Title	Attempted	Earned	Grade
LAW	217	PROPERTY Mark Kelman	4.00	4.00	MPH
LAW	224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE Lara Hoffman	2.00	2.00	MPH
LAW	2402	EVIDENCE David Sklansky	4.00	4.00	MPH
LAW	7098	TOPICS IN CONSTITUTIONAL LAW Bernadette Meyler	3.00	3.00	MPH

2020-2021 Autumn

Course		Title	Attempted	Earned	Grade
LAW	400	DIRECTED RESEARCH Bernadette Meyler	2.00	2.00	H
LAW	3505	LAW AND CULTURE IN AMERICAN FICTION: TRAUMA, RESISTANCE, DISSENT Ticien Sassoubre	3.00	3.00	L
LAW	7038	REMEDIES Mark Lemley	3.00	3.00	P
LAW	7041	STATUTORY INTERPRETATION Jane Schacter	3.00	3.00	P

2020-2021 Winter

Course		Title	Attempted	Earned	Grade
LAW	4017	ADVANCED TORTS: DEFAMATION, PRIVACY, AND EMOTIONAL DISTRESS	3.00	3.00	H
Transcript Note:		Gerald Gunther Prize for Outstanding Performance Robert Rabin			
LAW	5801	LEGAL STUDIES WORKSHOP Barbara Fried	1.00	1.00	MP
LAW	5810	BEHIND THE DOCTRINAL CURTAIN: LAW SCHOOL'S CONCEPTS AND THEMES Mark Kelman	3.00	3.00	H
LAW	7044	SUPREME COURT SIMULATION SEMINAR Lawrence Marshall	3.00	3.00	P

Send To: Christian Soler
USA

STANFORD UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
STANFORD, CA 94305-6032

Name: Soler,Christian Daniel
Student ID: 06320803

Johanna Metzgar
Registrar

2020-2021 Spring

Course		Title	Attempted	Earned	Grade
LAW	1001	ANTITRUST	4.00	4.00	H
		Barbara van Schewick			
LAW	1003	BANKRUPTCY	3.00	3.00	P
		George Triantis			
LAW	2009	WHITE COLLAR CRIME	3.00	3.00	P
		David Mills			
LAW	5801	LEGAL STUDIES WORKSHOP	1.00	1.00	MP
		Barbara Fried			

2021-2022 Autumn

Course		Title	Attempted	Earned	Grade
LAW	1029	TAXATION I	4.00	4.00	P
		Joseph Bankman			
LAW	7001	ADMINISTRATIVE LAW	4.00	4.00	P
		Anne O'Connell			
LAW	7828	TRIAL ADVOCACY WORKSHOP	5.00	5.00	MP
		Sallie Kim; Sara Peters; Timothy Hallahan			

2021-2022 Winter

Course		Title	Attempted	Earned	Grade
LAW	881	EXTERNSHIP COMPANION SEMINAR	2.00	2.00	MP
		Michael Winn			
LAW	882	EXTERNSHIP, CIVIL LAW	7.00	7.00	MP
		Michael Winn			
LAW	2028	CRIMINAL JUSTICE AND THE CRISIS OF AMERICAN DEMOCRACY	2.00	2.00	H
		David Sklansky			
LAW	2403	FEDERAL COURTS	4.00	4.00	H
		Norman Spaulding			

2021-2022 Spring

Course		Title	Attempted	Earned	Grade
LAW	910A	IMMIGRANTS' RIGHTS CLINIC: CLINICAL PRACTICE	4.00	4.00	P
		Jayashri Srikantiah; Lisa Weissman-Ward			
LAW	910B	IMMIGRANTS' RIGHTS CLINIC: CLINICAL METHODS	4.00	4.00	H
Transcript Note:		Judge Thelton E. Henderson Prize for Outstanding Performance			
		Jayashri Srikantiah; Lisa Weissman-Ward			
LAW	910C	IMMIGRANTS' RIGHTS CLINIC: CLINICAL COURSEWORK	4.00	4.00	H
		Jayashri Srikantiah; Lisa Weissman-Ward			

END OF TRANSCRIPT

Send To: Christian Soler
USA

Office of the University Registrar
Stanford University
Stanford, California 94305-6032

Grade point average and rank in class are not computed and are not available. Four grading systems are used at Stanford University. The general University grading system is used in all courses except those taught in the School of Law, the Graduate School of Business, or to M.D. students in the School of Medicine.

Unit of Credit: Every unit for which credit is given is understood to represent approximately three hours of actual work per week for the average student. Thus, in lecture or discussion work, for 1 unit of credit, one hour per week may be allotted to the lecture or discussion and two hours for preparation or subsequent reading and study. Where the time is wholly occupied with studio, field, or laboratory work, or in the classroom work of conversation classes, three full hours per week through one quarter are expected of the student for each unit of credit; but, where such work is supplemented by systematic outside reading or experiment under the direction of the instructor, a reduction may be made in the actual studio, field, laboratory, or classroom time as seems just to the department.

Academic programs include a status effective the day the transcript was printed. Stanford University uses the following program statuses:

Active: Student is currently active in the program indicated.

Leave of Absence: Student is currently on an official leave of absence from active study.

Completed: Student program requirements have been met and the degree has been awarded (degree programs only).

Discontinued: Student no longer enrolled in program (includes post-doctoral scholars whose appointments have ended).

Dismissed: Student was dismissed from the University.

Cancelled: Student deceased while enrolled and program cancelled or student administratively withdrawn for cause.

CHRONOLOGY OF GENERAL UNIVERSITY GRADING SYSTEM

Current (effective Summer Quarter 2008-09):

A (+,-)	Excellent
B (+,-)	Good
C (+,-)	Satisfactory
D (+,-)	Minimal Pass
NP	Not Passed
CR	Credit (student-elected satisfactory: A, B, or C equivalent)
S	No-option Satisfactory (A, B, or C equivalent)
NC	No Credit (unsatisfactory performance, D+ or below equivalent)
I	Incomplete
L	Pass, letter grade to be reported
N	Continuing Course
RP	Repeated Course
GNR	Grade Not Reported
W	Withdrew

Note: The notation * was changed to GNR (Grade Not Reported).

Spring Quarter 2019-20: All undergraduate and graduate courses graded Satisfactory/No Credit (S/NC).

Effective Autumn Quarter 1995-96:

A (+,-)	Excellent
B (+,-)	Good
C (+,-)	Satisfactory
D (+,-)	Minimal Pass
NP	Not Passed
CR	Credit (student-elected satisfactory: A, B, or C equivalent)
S	No-option Satisfactory (A, B, or C equivalent)
NC	No Credit (unsatisfactory performance, D+ or below equivalent)
I	Incomplete
L	Pass, letter grade to be reported
N	Continuing Course
RP	Repeated Course
*	No Grade Reported
W	Withdrew

Autumn Quarter 1994-95: RP was introduced to replace the original grade for a course later retaken. The grade of I (incomplete) was changed to automatically lapse to NP or NC after one year.

Effective Autumn Quarter 1989-90:

A (+,-)	Exceptional Performance
B (+,-)	Superior Performance
C (+,-)	Satisfactory Performance
D (+,-)	Minimal Pass
L	Pass, letter grade to be reported
+	Satisfactory, student elected (A, B, or C)
S	Satisfactory, no option (A, B, or C)
N	Continuing Courses
*	No Grade Reported
I	Incomplete

Note: The P notation has been changed to S (Satisfactory). The lowest acceptable grade for either S or '+' is now C-.

Effective Autumn Quarter 1975-76:

A (+,-)	Exceptional Performance
B (+,-)	Superior Performance
C (+,-)	Satisfactory Performance
D (+,-)	Minimal Pass
L	Pass, letter grade to be reported
+	Pass, student elected (A, B, C, or D)
P	Pass, no option (A, B, C, or D)
N	Continuing Courses
*	No Grade Reported
I	Incomplete

Note: Under this system, Stanford restored the D grade, defining it as 'Minimal Pass.' Pass notations ('+' and P) were redefined to encompass all passing grades, A through D.

Summer Quarter 1972-73: P was introduced to denote pass in a course offered only pass/no credit at the option of the instructor.

Spring Quarter 1971-72: '+' and '-' as grade modifiers were reintroduced for all students.

Autumn Quarter 1971-72: '+' and '-' as grade modifiers were reintroduced for graduate students.

Effective Autumn Quarter 1970-71:

A	Exceptional Performance
B	Superior Performance
C	Satisfactory Performance
L	Pass, letter grade to be reported
+	Pass, student elected (A, B, or C)
N	Continuing Course
*	No Grade Reported
I	Incomplete

Note: The grades A, B, C, and '+' were redefined: D, E, F, W, and '-' were dropped from the grading system. Under the prior system, the University maintained records of all courses a student attempted. But under the revised system, the only courses recorded were those that were successfully completed or for which an I (incomplete) grade was given. The revised system also allowed a student or instructor to request the deletion of an I grade from a student's record if the student did not meet the requirements of the course within the time limit determined by the instructor. The use of the modifying suffixes '+' and '-' appended to letter grades was discontinued.

Effective Autumn Quarter 1963-64:

A	Excellent
B	Good
C	Satisfactory
D	Minimum Credit
E	Conditioned
F	Failed
N	Continuous Course
W	Unauthorized Withdrawal
I	Incomplete
*	No Grade Reported
+	Passed Without Defining Grade
-	Failed Course Taken Pass/Fail

Prior to Autumn Quarter 1963-64:

A	Excellent
B	Good
C	Fair
D	Barely Passed
E	Conditioned
F	Failed
N	Continuous Course
W	Unauthorized Withdrawal
I	Incomplete
*	No Grade Reported
+	Passed Without Defining Grade
-	Failed Course Taken Pass/Fail

CHRONOLOGY OF THE SCHOOL OF LAW GRADING SYSTEM

Effective Autumn Quarter 2009-10, units earned in School of Law are quarter units. Units earned in School of Law prior to 2009-10 are semester units.

Current (effective Autumn 2008-09):

H	Honors (exceptional work, significantly superior to the average performance at the school)
P	Pass (successful mastery of the course material)
R	Restricted Credit (work that is unsatisfactory)
F	Fail (work that does not show minimally adequate mastery of the material)
MP	Mandatory Pass (representing P or better work)
MP-H	Mandatory Pass – Public Health Emergency (effective during the 2020 global pandemic)
N	Continuing Course
I	Incomplete
*	No Grade Reported
GNR	Grade Not Reported (effective Autumn Quarter 2009-10)

Spring Quarter 2019-20: All Law courses graded Mandatory Pass-Health (MPH/F).

Note: Under this grading system, in 2008-09 third-year J.D. students remained under the prior grading system (below).

Effective Autumn 2001-02:

4.3, 4.2	A+
4.1, 4.0, 3.9	A
3.8, 3.7, 3.6, 3.5	A-
3.4, 3.3, 3.2	B+
3.1, 3.0, 2.9	B
2.8, 2.7, 2.6, 2.5	B-
2.2	Restricted Credit
2.1	Failure
I	Incomplete
K	Credit (student elected)
KM	Credit (mandatory)
RK	Restricted Credit
NK	Failure
N	Continuing Course
*	No Grade Reported

Note: The grading system was revised to a number system with letter equivalents and the grades of 2.3 and 2.4 (C+) were eliminated.

Effective Autumn 1983-84:

A+	4.3, 4.2
A	4.1, 4.0, 3.9
A-	3.8, 3.7, 3.6, 3.5
B+	3.4, 3.3, 3.2
B	3.1, 3.0, 2.9
B-	2.8, 2.7, 2.6, 2.5
C+	2.4, 2.3
R	2.2 (restricted credit)
F	2.1 (failure)
N	Continuing Course
I	Incomplete
*	No Grade Reported
K	Credit (student elected)
KM	Credit (mandatory)
RK	Restricted Credit

Note: The C, C-, D+, D and D- grades were eliminated. The grade of R (Restricted Credit) was introduced with the value of 2.2. The RK and F grades were redefined to a value of 2.2 and 2.1 respectively. Students may elect to take a limited number of courses on the K, RK, NK system. K shall be awarded for work that is comparable to numerical grades 4.3 - 2.3, RK for 2.2, an NK for 2.1.

Effective Autumn 1969: A second grading system was introduced with the following values:

K	Credit (1.7 - 4.3)
RK	Restricted Credit (0.9 - 1.6)
NK	No Credit (0 - 0.8)

Prior to Autumn 1969-70:

A+	4.3, 4.2
A	4.1, 4.0, 3.9
A-	3.8, 3.7, 3.6, 3.5
B+	3.4, 3.3, 3.2
B	3.1, 3.0, 2.9
B-	2.8, 2.7, 2.6, 2.5
C+	2.4, 2.3
C	1.9, 2.0, 2.1
C-	1.8, 1.7, 1.6, 1.5
D+	1.4, 1.3, 1.2
D	1.1, 1.0, 0.9
D-	0.8, 0.7, 0.6
F	0.0

Note: This system employs letter grades with numerical equivalents.

THE SCHOOL OF MEDICINE GRADING SYSTEM

The following grades are used in reporting on the performance of students in the M.D. program:

+	Pass. Indicates that the student has demonstrated to the satisfaction of the department or teaching group responsible for the course that s/he mastered the material taught in the course.
-	Fail. Indicates that the student has not demonstrated to the satisfaction of the department or teaching group responsible for the course that he or she has mastered the material taught in the course.
EX	Exempt. Course exempted by examination. No units granted.
N	Continuing Course
I	Incomplete
GNR	Grade Not Reported (effective Autumn Quarter 2009-10)

CHRONOLOGY OF THE GRADUATE SCHOOL OF BUSINESS GRADING SYSTEM

Current (Effective Autumn 2000-01):

H	Honors
HP	High Pass
P	Pass
LP	Low Pass
U	Unsatisfactory
EX	Course Exempted (does not affect grade point calculations)
+	Pass (LP or better)
GNR	Grade Not Reported (effective Autumn Quarter 2009-10)

Effective Autumn Quarter 1971-72:

H	Distinction. Work that is of markedly superior quality.
P+	Work that is of high quality and exceeds in a significant way all of the basic requirements of the course.
P	Pass. Work that is of good quality and clearly satisfies all the basic requirements of the course.
P-	Low Pass. Work that satisfies most of the basic require-ments of the course but is deficient in some minor way.
U	Unsatisfactory. Work that does not satisfy the basic requirements of the course and is deficient in significant ways.
EX	Course Exempted (does not affect grade point calculations)
+	Pass (P- or better)

Mark G. Kelman
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June 19, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

Christian Soler, who graduated from the law school here at Stanford in 2021 and has been working as a litigation associate at Skadden for more than a year now, tells me that he has applied to serve as your law clerk. I taught him in a Zoom-only large Property class during his first year here – started right after lockdown – and while I thought he did perfectly fine work in the class, the truth is that I was not able to get a very strong sense of my students that term. Not only was class strange (very few folks other than those on panel on a particular day spoke much and there was practically no after-class interaction at all), but the students did not even take a conventional exam. (They gave pass/fail responses to a series of handout homework problems.) When I got to know, and admire, Christian a good deal more was during his second year here, when he was one of nine students in a seminar with the obviously overblown title, "Behind the Doctrinal Curtain: Law School's Concepts and Themes." I had an incredibly impressive, high-achieving group in that class, and in many ways, I found Christian the most interesting and engaging of the group.

The basic claim that underlies the course is that "classroom" courses here at Stanford and other "elite" law schools have both a text (the doctrines and policies in the particular subject areas that students study in detail) and a "sub-text" (the concepts and themes that recur across a wide range, maybe all, of these courses). Our goal in the course was to identify and highlight these recurring themes; to discuss explicitly the distinct approaches to each of these concerns that academic lawyers and practitioners have taken; and to expose students to some ways of approaching these issues that might be less familiar to them. Over the course of the term, we discussed some conceptions of the overall structure of law school discourse and the curriculum (noting that whatever the political views of particular professors, the curriculum was structured so as to treat late nineteenth century private-law centric libertarianism as the core of law and the redistributive and "regulatory" state as "exceptional;" discussed problems we confront in administering substantive legal rules (e.g., the choice between rules and standards; the choice between conduct and output-oriented regulation; remedial options and the choice between private, public and mixed enforcement systems; issues of interpretation of texts); and, finally, a set of commonplace substantive questions (e.g., issues about causation, objective v. subjective standards, issues about motive v. intent). In discussing all of these topics, we drew on the insights offered by a wide array of "schools" of legal thought, including, but not limited to, libertarianism; (both neo-classical and behavioral) Law and Economics; Critical Race Theory; Legal Realism; Critical Legal Studies; a variety of Feminist Legal Theories (anti-subordination feminism, "cultural" feminism); Langdellian Formalism and neo-Formalism; Law and Society.

No student could possibly have been fully prepared to critically engage all of the readings we did or to apply the more general points we were considering to a range of substantive issues they had studied in their other courses. Still, I thought Christian not only worked harder than any other student in the class both to interrogate the general claims and to work with examples from doctrinal classes (both ones that other students had brought up and those that he raised himself) but that he quite regularly had terrific insights into the material. That was true when we were dealing with material that was more on the political theoretical side (e.g., the discussions of some of the critiques of what I called the "libertarian core" of the curriculum) and when we were discussing material that was much more doctrinal (e.g., on alternative models of statutory interpretation, on the motive/purpose distinction in criminal law.) One student in the class (one of the very strongest in his graduating class) wrote a couple of reaction papers that I thought were a mite stronger than Christian's, so that he did not win the Class Prize for outstanding performance, but I thought each of his papers was lucid, creative, and carefully reasoned.

Christian is not just a very engaged and gifted student, but is an incredibly thoughtful person as well. His reflections on his experiences, both as an attorney and in doing pro bono quasi-attorney work back in New Haven when he was a Yale undergrad, are far more thoughtful than one expects from someone so young! He is just as thoughtful about his experiences as an "outsider" growing up in Katy, Texas, and his ambivalence about his decisions to break with much (but by no means all) of his past. I think he'd not only do great work in your chambers, but that he'd be someone you would love to have the opportunity to mentor.

I am confident that Christian is a very strong candidate, but do suggest that you speak with both Jayashri Srikantiah and Bernie Meyler, each of whom worked far more closely with him on longer writing projects than I did. I suspect that Jayashri, who supervised him in Immigration Clinic, might have the best sense of us all about the skills he will most need to display as a clerk.

At any rate, I recommend Christian very highly. I would be happy to speak to you or answer follow-up email questions if you'd indeed like to follow up.
Sincerely,

Mark Kelman - mkelman@stanford.edu - (650) 723-4069

/s/ Mark G. Kelman

Mark Kelman - mkelman@stanford.edu - (650) 723-4069

StanfordLawSchool

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Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

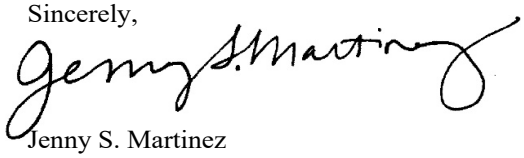
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

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Professor, by courtesy, English
Associate Dean for Research and Intellectual Life
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June 19, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am thrilled to have the chance to recommend Christian Soler for a clerkship in your chambers. Christian is a wonderful writer, both in legal and non-legal contexts, and a brilliant thinker. I am certain that he will make a first-rate law clerk.

I was fortunate to have Christian in my first-year Constitutional Law class, right before the pandemic hit. While careful not to monopolize class time, Christian often participated valuably in class discussion, raising important and nuanced points and also responding with preparation and acumen to doctrinal questions I asked while he was on panel. By the time of final exams, the Law School had to close due to Covid-19 and many students had already scattered so as to make it back to their homes before travel restrictions would prevent them from doing so. The difficult decision was made at that point to move entirely to pass-fail grades for any Winter quarter exam-based classes. Notwithstanding those circumstances, Christian produced an exam that clearly demonstrated his knowledge of the underlying materials.

In light of the pandemic and the physical closure of the Law School, I decided to offer a somewhat differently structured seminar in the Spring of 2020 on "Topics in Constitutional Law." For five of the sessions, we all met as a group and discussed some advanced questions in constitutional law in which the students had expressed interest, including issues of comparative constitutional law and federalism, as well as the constitutional implications of Covid-19. For the other four weeks, I asked each student either to draft a response paper or to write an installment of a longer research paper that they would complete and then met with each individually for at least half an hour.

Christian came to our first session with a few questions that had been prompted by first-year Constitutional Law. His wonderfully written response papers covered several of these disparate topics, and I found our conversations about each both thought provoking and generative for me as well as him.

In the aftermath of the "Topics" class, Christian decided to work on directed research developing one of his shorter papers into a full-scale note. This piece, which I think will make a fantastic note, uses the *New York State Pistol & Rifle Ass'n v. New York* case, which the Supreme Court disposed of on mootness grounds, as a jumping off point for considering the rationales underlying mootness doctrine more generally and, in particular, the different ways in which mootness produced by a change in law should be treated than mootness derived from other policy shifts or one-off decisions. In the course of Christian's research into this topic, I met with him on a number of occasions, and he often demonstrated insights both about the doctrines we discussed and about how to carve out a niche for his own argument amidst the wealth of scholarship on constitutional issues.

During our conversations, Christian mentioned his considerable background studying the humanities as an undergraduate at Yale. Given this circumstance and how valuable I had found his insights into constitutional law, I invited him to serve as a research assistant last summer on a book I am writing called *Law and Literature: An Introduction*. In that capacity, Christian furnished me with extensive background research for several chapters, including one on "Law, Literature, and Identity." My conversations with him also helped to develop and clarify aspects of my argument in several of the chapters. In the wake of my work as Chair of Stanford University's Advisory Committee on Renaming Jordan Hall and Removing the Statue of Louis Agassiz, I also asked Christian to help me with an academic paper comparing debates about monuments in the public sphere with arguments about religious symbols in the Establishment Clause arena. Christian furnished me with fantastic material and, again, our discussions greatly aided me in writing the piece, which I have now presented on several occasions and will be publishing soon.

Christian was also been very active in the SLS community during his time as a law student and despite the obstacles that Covid-19 have posed. Among his many extracurricular activities, he was a member of the Stanford Law Review and worked in the capacity of Associate Editor for Stanford Law Review Online. He has also been active in OutLaw and the Stanford LatinX Law Students Association.

Christian's excellent writing, his intellectual firepower, and his fabulous work as a collaborator will all, I believe, render him a pleasure to have as a law clerk. If you have any further questions about his candidacy, please do not hesitate to give me a call on my cell phone ((718)753-4456) or send me an e-mail.

Bernadette Meyler - bmeyler@law.stanford.edu

Sincerely,

/s/ Bernadette Meyler

Bernadette Meyler - bmeyler@law.stanford.edu

Jayashri Srikantiah
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June 19, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I write to strongly recommend Christian Soler for a clerkship in your chambers. I came to know Christian very well over the spring 2022 quarter in the Immigrants' Rights Clinic, which I direct. Christian is charismatic, kind, creative, and smart. He was the heart of the clinic during his clinic quarter. He set an example for engaged class participation and deep collaboration with his clinic student partner. He embodies a joyous, inclusive leadership style. He is intelligent and insightful on many levels. But what sets him apart is his amazing ability to engage with others to bring out the best in the other person. With Christian, the sum of the collaboration is truly greater than the parts. Particularly because of Christian's extraordinary collaboration skills, I think he will make a wonderful judicial law clerk.

During his quarter in the Clinic, Christian represented a lawful permanent resident who is in removal (deportation) proceedings because of a prior marijuana possession conviction. Along with a partner, Christian was tasked with drafting an opening brief to the Ninth Circuit Court of Appeals. The case was incredibly complex, both factually and legally. The administrative record was voluminous, and the legal claims were undefined when Christian began working.

Christian developed the portion of the brief that focused on a due process argument. Christian's client was disabled, but the immigration court had ordered him removed without providing the accommodations required by the Rehabilitation Act and the Due Process Clause. There is almost no case law about the application of the Rehabilitation Act to disabled noncitizens in removal proceedings. The case law about the due process accommodations due to disabled noncitizens is only slightly more developed. None of this deterred Christian. He met with the law librarian on multiple occasions to develop a research plan. He then dove into all available cases about the Rehabilitation Act from other contexts, as well as the Department of Justice's implementing regulations. At the same time, Christian started with foundational due process cases and built up an understanding of how the courts have applied due process in removal proceedings. Based on this research, Christian began to craft a brand-new legal argument.

As he developed his claim, Christian worked closely with the record in the case. Christian's client had represented himself pro se in his immigration proceedings. Christian pored over the transcript, finding every possible place where the immigration judge had failed to accommodate the client. Christian also obtained and listened to the audio recording of the proceedings, augmenting his understanding of the record and where accommodations had not been provided.

With this knowledge of the factual record and law in hand, Christian worked closely with his client, who is detained at a facility in Nevada. Christian was required to conduct his interviews with the client on the phone. This only made Christian more determined to establish a close rapport with the client. Very early in the quarter, Christian decided that he should meet with the client weekly by phone, even just to provide some human contact. These meetings formed the foundation of a deep connection between Christian and the client, a connection that solidified even further when Christian and his partner flew to Nevada to meet with the client in person.

Christian's first outline of his brief section reflected his nimble, creative approach to the law. He presented this outline to the class for a workshop, graciously inviting and incorporating his classmates' feedback. Christian truly excels in group settings. He inspires others to share their best input, which then contributes to the overall work product. Christian then took this input to heart, revising his outline into a detailed and thorough argument that protected his client's right to accommodations.

Christian is a strong legal writer. His first draft of the brief was clear and comprehensive. He thought carefully about how to integrate the facts with the legal standard. He excelled at drawing out the best facts to illustrate the client's need for an accommodation, juxtaposing the facts against the legal requirements of the Rehabilitation Act and Due Process. I was incredibly proud of the brief we filed in immigration court.

Throughout the quarter, Christian gave meaning to the term "zealous representation." He truly felt the weight of responsibility of the case on his shoulders. Christian sought to ensure that his client understood and took ownership for the decisions in the case, despite the incredible complexity of the legal standard and the fact that the client was in detention hundreds of miles away. Christian was able to channel his frustrations with the criminal and immigration laws into providing thorough and creative

representation to his client.

In addition to his individual client work, Christian worked with a team of students to investigate conditions at a recently opened immigration detention facility. Christian led several conversations with advocates to learn about their experience with the facility. He was able to integrate his knowledge from these conversations with his research about the immigration detention system. I observed him as he met with immigration advocates to learn more about their experiences with the facility. Christian is a wonderful listener. He gently encouraged others to share their insights, rewarding them with deep, respectful listening. Through this process, Christian was able to elicit extremely useful information about the facility that helped to serve as the basis for our advocacy moving forward.

On a personal level, Christian is an energetic and unfailingly kind person. He is a delight as a human being. His infectious positivity and creativity make him a joy as a collaborator. I very much enjoyed working with him.

I am confident that Christian will be a wonderful judicial law clerk. I recommend him wholeheartedly for a clerkship in your chambers. Please do not hesitate to contact me with any questions.

Sincerely,

/s/ Jayashri Srikantiah

Jayashri Srikantiah - jsrikantiah@law.stanford.edu - 650-724-2442

CHRISTIAN SOLER

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Writing Sample: Appellate Brief

The following writing sample is an excerpt from an opening brief at the Ninth Circuit Court of Appeals. My client, a noncitizen subject to a removal order, wished to challenge the Board of Immigration Appeals' decision.

Over the course of two months, I worked with the members of Stanford's Immigrants' Rights Clinic to develop a Due Process argument for a new cancellation of removal hearing before the Immigration Judge. Central to this argument was the Immigration Judge's failure to accommodate my client's speech disability or consider his disability in her credibility determinations.

Though this argument is a product of conversations with members of the Clinic, this sample represents an earlier draft before any substantial editing from the Clinical Director. Omitted from this sample is a second argument regarding proper application of the categorical rule to the state law conviction that triggered deportation proceedings against my client.

Please note that for the purpose of this application, names of specific individuals have been changed to preserve confidentiality.

Thank you for your time and consideration of my application.

Best regards,

Christian Soler

I. The IJ Failed to Accommodate Mr. Smith's Life-Long Speech Disability in Violation of Due Process, Statute, and Regulation.

If this Court finds that Mr. Smith's conviction relates "to a controlled substance offense" *and* is not "a single offense involving possession for one's own use of 30 grams or less of marijuana," 8 U.S.C. § 1227(a)(2)(B)(i), the Court should remand for the Immigration Judge ("IJ") to conduct a new hearing to determine whether to grant Mr. Smith cancellation of removal under 8 U.S.C. § 1229b. During Mr. Smith's pro se cancellation hearing, the IJ disregarded his speech disability. This violated Due Process, Section 504 of the Rehabilitation Act, and the Department of Justice's ("DOJ") own disability accommodation regulations. *See* 28 C.F.R. § 39 (1984).

A. From an Early Age, Mr. Smith has Suffered from a Severe Speech Impairment, a Condition that Requires Accommodation.

Mr. Smith struggles with a speech fluency disorder that impedes his communication through stuttering and involuntary muscle movements in the face and mouth. Unaided by counsel, Mr. Smith requested accommodation for his speech disability six times throughout his removal hearings. A.R. 117, 121, 135, 143, 175, 289.[1] He also raised it during testimony three times, A.R. 189, 207, 252; once in his written declaration, A.R. 346; and his mother also noted it in her testimony and declaration. A.R. 300, 317, 360.

Mr. Smith's speech impairment obstructs his ability to communicate. Formally known as Childhood-Onset Fluency Disorder, Mr. Smith's speech impairment manifests as a disturbance of the "normal fluency and time patterning of speech" that "interferes with academic or occupational achievement or with social communication." *See* Am. Psychiatric Ass'n, *Diagnostic and Statistical*

[1] IJ Jones acknowledged Mr. Smith's "speech impediment" in her written decision when addressing his asylum claim. *See* A.R. 60.

Manual of Mental Disorders 45-47 (5th ed. 2013) [hereinafter "DSM-V"]. This impairment limits the range of vocal sounds he can produce due to involuntary tremors of the mouth, worsened in high-pressure situations like deportation proceedings. *Id.*. Therefore, Mr. Smith struggles to communicate effectively when required to give frequent, unplanned responses under conditions of stress. *See Fluency Disorders*, Am. Speech-Language-Hearing Ass'n, https://www.asha.org/practice-portal/clinical-topics/fluency-disorders/#collapse_2 (last visited June 13, 2022) [hereinafter "ASHA"]; DSM-V at 45-47.

Speech impairments like Mr. Smith's are a recognized disability, afforded both protection and accommodation by DOJ, which governs the nation's immigration courts. Under 28 C.F.R. § 39.101, the DOJ commits its agencies—including the Executive Office for Immigration Review—to nondiscrimination against those with speech disabilities. *See also* 28 C.F.R. § 39.103(1)(i-ii) (recognizing physiological and psychological disorders affecting speech or speech organs). Other federal agencies charged with immigration enforcement similarly accommodate speech disabilities. For example, Immigration and Customs Enforcement recognizes the obligation to provide "any reasonable change or adjustment" to operations for individuals with impaired "speaking skills." U.S. Immigration and Customs Enforcement, *ICE Disability Access Plan*, 11 (2020), https://www.dhs.gov/sites/default/files/publications/ice_disability_access_plan_508_08-19-20.pdf. And U.S. Citizenship and Immigration Services ("USCIS") suggests accommodations applicable to individuals with speech disabilities, such as permitting non-verbal communication, providing additional time, and changing the site of naturalization exams. U.S. Citizenship and Immigration Services, *USCIS Policy Manual*, vol. 12, pt. C, ch. 3 (2022), https://www.uscis.gov/policy-manual/volume-12-part-c-chapter-3.

Other legal contexts similarly recquire accommodation for speech disabilities. For instance, under the Individuals with Disabilities Education Act (IDEA), students with speech impairments have been entitled to accommodation. *See, e.g.*, *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 579 (5th Cir. 2009). Likewise, speech impairment qualifies as a disability under the Americans with Disabilities Act. *See, e.g.*, *Medvic v. Compass Sign Co., LLC*, No. CIV.A. 10-5222, 2011 WL 3513499, at *7 (E.D. Pa. Aug. 10, 2011). The law recognizes Mr. Smith's speech impairment as a disability warranting accommodation.

B. The IJ Violated Due Process by Failing to Investigate and Accommodate Mr. Smith's Speech Disability.

IJ Jones refused to consider, much less accommodate, Mr. Smith's speech disability, violating the Due Process Clause's requirement of a full and fair hearing for all noncitizens in removal proceedings. *See Cinapian v. Holder*, 567 F.3d 1067, 1073-74 (9th Cir. 2009). Mr. Smith meets both prongs of the Court's Due Process test. First, the IJ denied Mr. Smith "a full and fair hearing" by ignoring his speech disability, even though Mr. Smith asked for accommodations six times. *Colmenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000). Second, this failure prejudiced the outcome of the hearing because Mr. Smith's inability to communicate affected his credibility and the IJ's findings as to rehabilitation. This exceeds the standard for prejudice, which requires only that "the outcome [of the hearing] may have been affected" by the Due Process violations. *Id.* at 971. The Court should remand for a new cancellation hearing because the hearing Mr. Smith received was "so fundamentally unfair" that he "was prevented from reasonably presenting [his] case." *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1056 (9th Cir. 2005) (citation omitted).

1. The IJ denied Mr. Smith a full and fair hearing by disregarding his speech disability, thus hindering his capacity to present evidence and testimony.

IJ Jones's failure to investigate and accommodate Mr. Smith's speech disability obstructed his ability to communicate—an indispensable part of a full and fair hearing. "[L]ive testimony is the bedrock of the search for truth in our judicial system," *Oshodi*, 729 F.3d at 891 (citation omitted), especially in discretionary determinations like cancellation of removal, which turn on an assessment of equities and credibility. *See id*. Both Due Process and the INA rely on communication during the hearing to safeguard their promise: providing noncitizens with "'a reasonable opportunity to examine the evidence against [them] . . . , to present evidence on . . . [their] own behalf, and to cross-examine witnesses presented by the Government.'" *Cinapian*, 567 F.3d at 1074 (quoting 8 U.S.C. § 1229a(b)(4)(B)).

This Court underscored the need for communication to achieve a full and fair hearing in *Perez-Lastor v. I.N.S.* There, the Court upheld the Due Process claim of a noncitizen who did not receive effective interpretation from his native language to English during his asylum hearings. 208 F.3d 773 (9th Cir. 2003). Because the noncitizen was not "able to understand the questions posed to him and *to communicate his answers to the IJ*" the hearing violated Due Process. *Id.* at 778 (emphasis added); *see also Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir.1984) (holding a "hearing is of no value when the alien and the judge are not understood"). Like *Perez-Lastor*, the present case involves a discretionary grant of relief, where the IJ could not reasonably assess Mr. Smith's credibility absent effective communication with him. *See Perez-Lastor*, 208 F.3d at 781.

Further, for unrepresented noncitizens like Mr. Smith, the IJ should "ameliorate the damage" created from ineffective communication by "asking for clarification or repetition." *Id.* at 782 (citation omitted). Due Process and the INA both mandate that the IJ has an affirmative duty to "ensure that the record is fully developed for the benefit of the [pro se] applicant." *Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013).

IJ Jones violated Due Process in three ways. First, she failed to investigate the effect of Mr. Smith's disability on the hearing. Second, she failed to offer any accommodation to address communication issues during the cancellation hearing. Third, she failed in her affirmative duty to develop the record as required when a noncitizen, like Mr. Smith, appears pro se. Each failure denied him a full and fair hearing in violation of Due Process.

i. The IJ was required to investigate the effect of Mr. Smith's speech disability on his testimony and ability to present evidence.

Once Mr. Smith informed IJ Jones that he had "a speech impediment," and "ask[ed] the court for patience in [his] answers and [his] responses," A.R. 135, the IJ was required to investigate whether his disability would affect the hearing. In the related context of mental disabilities, immigration judges have a duty to investigate further when a noncitizen displays indicia of incompetence. *See Mejia v. Sessions*, 868 F.3d 1118, 1121 (9th Cir. 2017) (citing *In re M-A-M-*, 25 I. & N. Dec. 474, 480 (BIA 2011)). Nevertheless, IJ Jones did not ask a single question about Mr. Smith's speech disability, despite his six requests for help. *See* A.R. 117, 121, 135, 143, 175, 289. Given Mr. Smith appeared pro se, IJ Jones's failure to inquire about whether his speech disability would affect the hearing was especially unreasonable and unfair.

ii. Despite Mr. Smith's repeated notifications to the court of his disability, the IJ failed to offer accommodation.

Beyond failing to investigate, IJ Jones did not accommodate Mr. Smith's disability, thereby depriving him of the ability to communicate in a full and fair hearing. Any of five reasonable accommodations would have ensured a full and fair hearing for Mr. Smith, including: a) allowing the use of notes; b) additional time to respond and scheduled breaks; c) permitting non-verbal communication; d) an in-person hearing rather than video; and e) continuances so Mr. Smith could

take steps to reduce the impact of his disability and effectively question witnesses. IJ Jones offered not one accommodation.

a. The IJ did not allow notes to aid Mr. Smith's verbal fluency.

Mr. Smith attempted to use notes during his testimony, explaining that "documents calm [him] down, and they help [him] speak fluently." A.R. 175. IJ Jones rejected the request. A.R. 176. However, the use of written notes has been recognized by this Court as an appropriate accommodation for respondents whose disability interferes with their testimony. *See, e.g.*, *Aguirre-Urbina v. Barr*, 765 F. App'x 238 (9th Cir. 2019) (adopting procedural safeguard for noncitizen with a mental disability by allowing the use of notes). In fact, USCIS—another immigration agency—even permits "the applicant to answer the officer's questions in writing, as needed" in immigration applications. U.S. Citizenship and Immigration Services, *USCIS Policy Manual*, vol. 12, pt. C, ch. 3 (2022), https://www.uscis.gov/policy-manual/volume-12-part-c-chapter-3. By failing to allow Mr. Smith to use notes, the IJ denied him a reasonable accommodation necessary for effective communication.

b. The IJ did not provide Mr. Smith additional time to respond or schedule breaks in testimony and instead repeatedly interrupted him.

The IJ failed to give Mr. Smith more time before, during, and after his words and sentences as an accommodation for his disability. Fundamentally, Mr. Smith's speech disability disrupts the ordinary time pattern of speech—it is a condition that *requires* more time than the average person to effectively communicate. *See* DSM-V at 45-47 (noting "prolongations" and "filled or unfilled pauses in speech" exhibited by those with Childhood Onset Fluency Disorder). Additional response time and scheduled breaks have been recognized by immigration agencies as appropriate accommodations for those with speech disabilities. *See* U.S. Citizenship and Immigration Services, *USCIS Policy Manual*, vol. 12, pt. C, ch. 3 (2022) (elaborating multiple accommodations for

qualified individuals with disabilities), https://www.uscis.gov/policy-manual/volume-12-part-c-chapter-3.

Indeed, increased response time was recognized as a reasonable accommodation by IJ Steven Roberts, who presided over one of Mr. Smith's master calendar hearings, prior to his cancellation hearing. A.R. 142-44. When Mr. Smith informed IJ Roberts of his speech disability, she offered him additional time as an accommodation, stating: "If at any time you need to take more time or you need to explain further, just let me know, and I will give you the full opportunity to do so." A.R. 144. By contrast, at his cancellation hearing, which spanned 288 minutes over two days, IJ Jones failed to offer or provide additional time even once, denying him the ability to effectively communicate.

The IJ also failed to provide additional time by allowing Mr. Smith to be frequently interrupted. Individuals with speech disabilities are uniquely prejudiced by interruption because it detracts from the time they need to produce speech sounds. *See* ASHA (explaining that "competing for talk time" exacerbates fluency disorders). The IJ herself interrupted Mr. Smith repeatedly during his testimony. *See, e.g.*, A.R. 166, 170, 172, 191, 193, 258. She also interrupted Mr. Smith while he attempted to conduct a direct examination of his family members, impeding his ability to communicate and elicit testimony from witnesses. *See, e.g.*, A.R. 264 (Mr. Smith tried to question his brother about the emotional impact of deportation on his close family, only to be interrupted by the IJ asking an unrelated question and allowing DHS to begin examination). Finally, the IJ also permitted DHS to interrupt Mr. Smith during cross-examination. *See*, *e.g.*, A.R. 170, 231, 243. The IJ's failure to prevent both her own and DHS's interruptions exacerbated Mr. Smith's inability to communicate during his hearing.

c. The IJ refused to permit non-verbal communication.

IJ Jones failed to accommodate Mr. Smith by explicitly prohibiting his use of verbal fillers—such as "uh-huh" or "nuh-uh"—and non-verbal communication, like nodding. A.R. 176-77. But verbal fillers are common in the speech of those with disabilities like Mr. Smith. *See* ASHA. Other immigration agencies such as USCIS recognize the need to accommodate those with impaired speaking ability by permitting non-verbal communication. *See* U.S. Citizenship and Immigration Services, *USCIS Policy Manual*, vol. 12, pt. C, ch. 3 (2022), https://www.uscis.gov/policy-manual/volume-12-part-c-chapter-3. The IJ's prohibition of verbal fillers and non-verbal communication compounded Mr. Smith's inability to effectively communicate.

d. The IJ failed to hold an in-person hearing, instead forcing Mr. Smith to testify with a disability over video.

IJ Jones hampered Mr. Smith's ability to communicate at his cancellation hearing by conducting the hearing over video teleconference. This Court has recognized that a video-conference removal hearing can violate Due Process "depending on the degree of interference with the full and fair presentation of petitioner's case." *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012).

The IJ's decision to proceed by video hearing compounded her other failures to accommodate Mr. Smith's speech disability. For instance, the extended pauses typical of Mr. Smith's impaired speech, *see, e.g.*, A.R. 185, 189, 207, can be mistaken as failed connections or, even worse, an inability to recall the answer to a question. Further, the IJ permitted DHS counsel to appear telephonically and without seeing Mr. Smith on video, so DHS counsel was unable to see any visual cues from him that might indicate he was attempting to speak. A.R. 169 ("[T]he Department can't visually see the respondent, as the Department has elected to appear telephonically."). For those with a speech disability like Mr. Smith, tension in the face or straining

prior to speaking is common, and visually indicate attempts to produce words. *See* DSM-V (describing how those with Childhood Onset Fluency Disorder produce words "with an excess of tension"). Without the ability to see Mr. Smith, DHS counsel could not know when he was trying to speak, as illustrated by the frequent interruptions and need for clarification during DHS's cross-examination. *See, e.g.*, A.R. 223, 225, 243, 244, 249 (DHS interruptions and Mr. Smith's requests for clarification during cross-examination).

Removal hearings over video are also problematic because of frequent technical breakdowns, which disproportionately impact people with speech disabilities. *See, e.g.*, A.R. 160, 209, 218, 220, 229 (at least five instances of DHS telephonic malfunctions and various pauses in the record to rectify these issues). Dropped calls and distorted voices require Mr. Smith to repeat his testimony or further interrupt his already delayed speech. These technical malfunctions amplify existing barriers to understanding the speech of people with speech disabilities. Thus, the IJ's choice to hold the hearing over video teleconference interfered with Mr. Smith's ability to communicate.

e. <u>The IJ did not offer a continuance to give Mr. Smith time to compensate for his speech disability.</u>

As a pro se litigant, Mr. Smith did not know until the hearing started that he would be required to conduct a direct examination of his brother. *See* A.R. 257-58 (Mr. Smith explains "[he] didn't know that [he] was going to be cross-examining [his brother]."). Instead of offering Mr. Smith a continuance, IJ Jones required him to proceed immediately. But extemporaneous speaking poses a unique challenge for people with speech disabilities, particularly when confronted with external pressure to communicate clearly or rapidly. *See* ASHA (describing how the symptoms of fluency disorders become "more severe when there is increased pressure to communicate"). Given both Mr. Smith's disability, which he stated on the record multiple times, and the lack of notice

that he would be required to perform a direct examination, the IJ should have issued a continuance. *See* 8 C.F.R. §1003.29 (2021) (stating an immigration judge may grant a continuance for "good cause shown"). She failed to do so, preventing him from effectively communicating during his hearing.

* * * * *

The IJ denied Mr. Perez a full and fair hearing by failing to allow any one of these five reasonable accommodations: a) use of notes; b) additional time and scheduled breaks; c) non-verbal communication; d) in-person (not video) hearing; and e) a continuance instead of extemporaneous direct examination of witnesses.

iii. The IJ failed to consider Mr. Smith's speech disability even though she had an affirmative duty to develop the record.

Beyond her refusal to investigate and accommodate his disability, IJ Jones also failed to develop the record "for the benefit of the applicant." *Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013). For pro se respondents like Mr. Smith, the IJ must affirmatively ask about positive and negative equities, including family ties and rehabilitation. *See Jacinto v. I.N.S.*, 208 F.3d 725, 733 (9th Cir. 2000) (establishing the IJ's affirmative duty to develop the record); *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998) (noting "family ties" and "rehabilitation" among factors to determine whether to grant cancellation of removal). Here, her failures once again prejudiced Mr. Smith.

For instance, IJ Jones did not ask any questions about how Mr. Smith's disability affected the temporary loss of custody of his son Marcus, or the restoration of that custody. A.R. 219-26. As Mr. Smith testified on cross-examination by DHS, Child Protective Services initiated an investigation after Mr. Smith rushed his son to the hospital when the child injured himself while playing hide-and-seek. *See* A.R. 216 (recounting Mr. Smith's desperate attempt to get transportation to the hospital with his son in his arms). The IJ did not ask Mr. Smith, or his family,

a single question about whether his disability might have prevented him from communicating effectively with Child Protective Services. A.R. 214-21. Indeed, the IJ should have developed the record here: it is well documented that individuals with speech disabilities struggle to speak in moments of stress, such as the traumatic moment of rushing a toddler to the hospital. *See* DSM-V at 45-47; ASHA.

To exemplify further: the IJ also did not inquire how Mr. Smith's disability affected his subsequent attempts to seek full custody of his son after the child's mother left Nevada and took his son to Indiana without notice. *See* A.R. 223-25 (narrating Mr. Smith's attempt to secure custody of his son in both Nevada and Indiana family courts). Here too, Mr. Smith's speech disability likely impeded his communication with the family courts. But IJ Jones never asked and did not develop the record.

With respect to Mr. Smith's convictions, the IJ failed to develop the record as to how his disability affected his interactions with law enforcement. *See* A.R. 195-203 (illustrating the IJ's failure to even mention his disability in her questioning about his previous arrests). Mr. Smith's struggles to communicate with law enforcement due to his speech impediment in a way that may have distorted law enforcement's previous assessments of him.

When a respondent appears pro se, as Mr. Smith did, the IJ must develop the record to adequately balance his equities. Here, the IJ's pervasive failure to do so violated Due Process.

2. The IJ's Failure to Accommodate Mr. Smith's Disability and Properly Develop the Record Prejudiced the Outcome of His Cancellation Hearing.

The IJ's failure to investigate Mr. Smith speech disability, to provide accommodations, and to develop the record, negatively affected her balancing of the cancellation equities and her denial of his claim. This far exceeds the standard for prejudice, which requires only that "the outcome . . . may have been affected by the alleged violation." *Colmenar*, 210 F.3d at 971.

Cancellation of removal is a discretionary inquiry based on an immigration judge's assessment of a noncitizen's equities and rehabilitation. *See In re C-V-T-*, 22 I. & N. Dec. 7, 12 (BIA 1998). When, as here, the noncitizen cannot communicate effectively, the prejudice is pervasive because it operates to "prevent[] the introduction of significant testimony." *Oshodi*, 729 F.3d at 890 (citation omitted). Two examples illustrate this effect: (1) the IJ found that Mr. Smith had lost custody of his son because of his criminal conviction, when in fact, he did not; and (2) the IJ discredited Mr. Smith's statements regarding his rehabilitation, without regard to his speech disability.

i. Mr. Smith's hearing was prejudiced by the IJ's mistaken conclusions about the custody of his U.S. citizen son.

The IJ's failure to accommodate Mr. Smith's disability, and resulting communication issues, prejudiced the IJ's assessment of Mr. Smith's relationship with his ten-year-old U.S. citizen son, Marcus. A central negative equity cited for denying Mr. Smith favorable discretion was the IJ's finding that "he lost custody of his child Marcos [sic]," a fact she connected to Mr. Smith's conviction. *See* A.R. 74-75. However, this connection was wrong. In fact, as Mr. Smith attempted to tell the Court, after his conviction, he regained custody of Marcus. *See* A.R. 219-21. His later custody dispute was unrelated to the conviction but instead centered on his ex-partner's decision to move to Indiana. *See* A.R. 221-26.

The IJ's faulty link between Mr. Smith's custody of his son and his conviction stemmed from the IJ's failure to account for his disability. Mr. Smith could not communicate his true relationship with his son because of the IJ's unwillingness to offer accommodation, including the use of notes or additional time to formulate responses. *See* A.R. 175 (prohibiting the use of notes), 185-88 (IJ failing to offer additional time or a break during her questioning about Mr. Smith's custody of his son), 213-221 (IJ failing to offer additional time or a break during DHS's cross-

examination of Mr. Smith regarding custody of his son). The predictable result was that Mr. Smith was unable to communicate the full details of his relationship with Marcus, either during his own testimony or in response to cross-examination. *See* A.R. 185-88 (own testimony), 213-21 (cross-examination). Further, because the IJ failed to grant him a continuance before direct examination of his brother and mother, Mr. Smith could not correct the IJ's mistaken impression that he lost custody of his son due to his conviction. *See* A.R. 258-69, 281-82 (Mr. Smith's examination of his brother, without any discussion of Mr. Smith's son).

Still worse, the IJ did not follow up with any questions of her own to Mr. Smith, his mother, or his brother, regarding the incorrect connection she made between Mr. Smith's conviction and the custody of his son. *See* A.R. 214-226 (following DHS cross regarding the CPS investigation of Mr. Smith, the IJ asks no clarifying questions). Instead, the IJ relied on information elicited by DHS counsel in their cross-examination of Mr. Smith. *See* A.R. 219-26. As this Court recognized in *Jacinto v. I.N.S.*, a noncitizen suffers a Due Process violation when testimony is only "the product of an examination conducted by parties somewhat adverse to [his] position." 208 F.3d 725, 734 (9th Cir. 2000). If IJ Jones had asked *any* questions about how Mr. Smith regained custody of Marcus from CPS, she could have avoided her erroneous finding. Such a finding prejudiced the IJ's decision as to cancellation, as evinced in her written opinion, which cited it twice as a negative equity. A.R. 74-75.

ii. The IJ's credibility determination rejecting Mr. Smith's statement of responsibility reflects prejudice.

Despite Mr. Smith's testimony to the contrary, IJ Jones found that a negative equity weighing against his claim was that he "did not take responsibility for his substance abuse and his circumstances." *See* A.R. 75. This finding was distorted by Mr. Smith's speech disability and the IJ's failure to develop the record.

Cancellation of removal necessitates a showing of rehabilitation: "a respondent who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion." *In re C-V-T-*, 22 I. & N. Dec. 7, 12 (BIA 1998). Though many factors impact rehabilitation, ultimately an immigration judge centers their assessment on whether a noncitizen credibly testifies to their post-conviction rehabilitation. *See Oshodi*, 729 F.3d at 889. Here, the pervasive communication problems stemming from the IJ's failure to accommodate Mr. Smith's disability prejudiced her assessment of his credibility.

Mr. Smith stated to the immigration judge:

> "I know I've made mistakes, and I have paid for them. I'm still paying for them, and this is something that will always remain in the back of my mind and in my heart, as well, and I ask for compassion over me and I ask for forgiveness, as well. I take full responsibility for everything I've done." A.R. 325.

He further testified:

> "I have been reading the word of God and I have become a man of God. So, absolutely I have rehabilitated within myself spiritually with the help of God." A.R. 329.

Despite these statements, IJ Jones found that Mr. Perez "did not take responsibility for his substance abuse and for his circumstances." A.R. 75.

By denying Mr. Smith accommodations for his disability, the IJ hampered Mr. Smith's ability to communicate regarding his rehabilitation. Consider, by analogy, an individual who is not fluent in English, but forced to testify in English as to their rehabilitative efforts. Credibility would be deeply affected by the communication failure. *See Perez-Lastor*, 208 F.3d at 781 ("[A]n adverse credibility finding may result from a faulty translation." (citation omitted)). Similarly, in the case of mental disability, even when a respondent has been deemed competent to testify, "the factors that would otherwise point to a lack of honesty in a witness . . . may be reflective of a mental illness or disability." *Matter of J-R-R-A-*, 26 I. & N. Dec. 609, 611 (BIA 2015). The same is true

here: throughout his testimony on rehabilitation, Mr. Smith was impeded in his ability to communicate, prejudicing the judge's assessment.

The IJ also failed to ask questions about Mr. Smith's disability or rehabilitation, disregarding her duty to develop the record in a pro se case. For example, the IJ failed to ask about his motivation for rehabilitation. Mr. Smith and his family raised the subject of his Christianity and transformation following his conviction, but the IJ never followed up. *See* A.R. 360-61, 362-63 (his stepfather's declaration).

Instead of inquiring about Mr. Smith's rehabilitation and Christian faith, the IJ incorrectly found that he did not take responsibility because he testified on cross-examination that his drug use stemmed from his relationship with his ex-girlfriend, Diana. A.R. 226-31. Again, the IJ failed to investigate. For instance, the IJ did not ask whether Mr. Smith was in an abusive relationship, despite testimony from his mother, his stepfather, his brother, his sister, and his own statements that he was manipulated and physically abused by his ex-girlfriend. *See* A.R. 259-60 (his brother's testimony), 324 (his mother's testimony), 362-63 (his stepfather's declaration), 364-65 (his sister's declaration), 226 (own testimony); *see also* A.R 544 (detailing a previous incident of domestic violence perpetrated against Mr. Smith); A.R. 226-31 (showing the IJ's silence during questioning about Mr. Smith's girlfriend, Diana).

In addition, the IJ required Mr. Smith to question his family without benefit of a continuance, thereby limiting his ability to communicate with or ask them about his steps toward rehabilitation. Mr. Smith's mother and brother—both nurses—could have credibly testified as to Mr. Smith's rehabilitation from drug use. A.R. 258, 360. The judge failed to follow up with any questions relating to rehabilitation. *See* A.R. 257-283 (asking no questions on rehabilitation Omar Smith's testimony); A.R. 291-325 (asking no questions on rehabilitation during Joanna Smith's

testimony). As a result, witnesses who could have provided robust support for Mr. Smith's claim of rehabilitation were not able to do so.

The prejudice resulting from IJ Jones's failures is clear from her written opinion: she draws a direct line from Mr. Smith's "failure to take responsibility for his drug addictions and actions" to her denial of his request for cancellation. A.R. 75.

Supported by the foregoing reasons, the Court should remand for the IJ to give Mr. Smith a hearing that meets the requirements of Due Process.

C. The IJ Violated Section 504 of the Rehabilitation Act and DOJ Regulations by Failing to Accommodate Mr. Smith's Speech Disability.

The IJ's failure to accommodate Mr. Smith also violated Section 504 of the Rehabilitation Act and DOJ's implementing regulation in 28 C.F.R. § 39, which prohibit discrimination in immigration court based on handicap. 28 C.F.R. § 39.101. The IJ ran afoul of these provisions since Mr. Smith: (1) is "a qualified individual with a disability;" and (2) was denied "a reasonable accommodation that [he] needs in order to enjoy meaningful access to the benefits of public services." *Mark H. v. Hamamoto*, 620 F.3d 1090, 1097 (9th Cir. 2010).

First, Mr. Smith is a qualified individual with a disability under the Rehabilitation Act. Section 504 states a qualified individual is one with a "physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. 12102(1). "Speaking" is listed as a major life activity within the text of the ADA, which applies equally to the Rehabilitation Act. *Id.*; *See Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 884 (9th Cir. 2004) (establishing that the ADA and Rehabilitation Act operate under the same standards). Mr. Smith's disability—which impedes his ability to speak—thus qualifies him for accommodation under the Rehabilitation Act.

Second, Mr. Smith was denied accommodation for his disability in violation of the Act. Section 504 creates a duty, whereby the judge must "gather sufficient information from the disabled individual and qualified experts as needed to determine what accommodations are necessary." *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1136 (9th Cir. 2001). This affirmative obligation reaches its "apex" when an individual has been detained. *See Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 266– 67 (D.D.C. 2015). IJ Jones's failure to consider or grant any of Mr. Smith's multiple requests for accommodation denied him meaningful access to his immigration proceeding.

For the same reasons, IJ Jones also fell short of DOJ regulations implementing Section 504, a failure that, in itself, constitutes denial of meaningful access. *See A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1204 (9th Cir. 2016) ("We have held that a plaintiff may establish denial of "meaningful access" under section 504 and Title II by showing there was 'a violation of one of the regulations implementing' section 504.") (citation omitted)). The IJ never took "appropriate steps to ensure effective communication" nor "furnish[ed] appropriate auxiliary aids" that "give primary consideration to the requests of the handicapped person," as required by 28 C.F.R. § 39.160.

Therefore, this Court should hold that the IJ violated the DOJ's regulations implementing Section 504 and remand for a new cancellation hearing.

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Writing Sample: Mock Judicial Opinion

The following writing sample is a mock judicial opinion I drafted for a law school course that simulated the U.S. Supreme Court's 2020 Term. For the purpose of the simulation, I was assigned the role of Chief Justice John Roberts and was tasked with authoring opinions from his jurisprudential perspective.

This sample was written without external feedback or direction following the class's mock oral argument on the then-pending case *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021). At the time of drafting, the Supreme Court had not released an opinion in the case.

Thank you for your time and consideration of my application.

Best regards,

Christian Soler

SUPREME COURT OF THE UNITED STATES

No. 19-1257

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA, ET AL., PETITIONERS,
v.
DEMOCRATIC NATIONAL COMMITTEE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 27, 2021]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The case at bar presents a novel question in this Court's jurisprudence interpreting § 2 of the Voting Rights Act (VRA) of 1965, as amended in 1982. Specifically, we consider whether the Ninth Circuit correctly construed the text of § 2 as it pertains to a vote denial case. In the two-part test articulated by the Court of Appeals, a defendant violates § 2 when "more than a de minimis number of minority voters" are "disparately affected" by a voting practice, and "the disparate burden on minority voters is linked to social and historical conditions" of inequality. We decide, here, the aptness of this test. Further, we determine whether the "cat's paw" theory of liability may be deployed to prove intentional discrimination in violation of the Fifteenth Amendment. On both issues presented before this Court, we reverse the judgement of the Court of Appeals for the Ninth Circuit.

I.

A.

The state of Arizona maintains a number of voting policies that permit citizens to cast their ballots via different means: early voting, mail-in ballots, and in-person voting at various polling locations. Arizona voters—beginning 27 days before

Election Day—may complete ballots in-person at a designated early voting center, they may pick up a ballot and return it to the center at a later time, they may return the ballot via postage-free mail, or they may return the ballot to special drop boxes depending on their voting district. And on Election Day, voters may complete a ballot in-person at their designated polling center or hand-deliver a previously completed early voting ballot. However, there are two limitations impressed upon Arizona voters, the subject of the case before us.

First, Arizona counties may decide whether they will operate under a "vote-center model" or a "precinct model" to facilitate in-person voting on Election Day. Under the former, citizens of the county are permitted to vote at any vote center in the county; under the latter, citizens are assigned a single precinct location within the county at which they may vote. This latter model prohibits voting at a precinct location other than the one assigned, known as the "out-of-precinct" policy (OPP). Codified in A.R.S. §§ 16-122, 16-135, 16-584 as well as the Arizona Election Procedures Manual, the OPP is triggered whenever a voter arrives at a precinct voting location but does not appear on the "precinct register." The OPP requires that "only those ballots cast in the correct precinct" be counted, so officials at the polling location will direct a voter who does not appear on a given register to the correct precinct location. In addition, the voter may cast a "provisional ballot," after which a determination will be made as to whether the voter's residential address was appropriately located within the precinct—if so, the ballot is counted, if not, the ballot is not counted.

A second Arizona law, passed in 2016, targets fraud in the electoral process by limiting third-party ballot collection. Under A.R.S. § 16-1005(H)-(I), only "election officials, mail carriers, family or household members, or caregivers" may deliver an early ballot on behalf of another voter. The law was initially introduced in the state legislature as H.B. 2023, and debate surrounding the proposed measure was both partisan and contentious. Following rounds of argument, the bill passed along party lines. Two elements of the floor debate have since surfaced as warranting greater scrutiny: comments made by then-State Senator Don Shooter and "a racially charged video created by Maricopa County Republican Chair A.J. LaFaro." *Democratic Nat'l Comm.* v. *Reagan*, 329 F. Supp. 3d 824, 876 (D. Ariz. 2018). In then-Senator Shooter's statements, he claimed—without offering evidence—that there was

widespread ballot fraud in the state of Arizona. Similarly, the LaFaro video alleged that an anonymous Latinx man had been stuffing ballot boxes. Both the comments and video were circulated and discussed during the debate on H.B. 2023.

B.

Just prior to Election Day, 2016, the Democratic National Committee (DNC) filed for a preliminary injunction against the Arizona Secretary of State in the District of Arizona. The DNC sought to enjoin enforcement of both the OPP and the ballot-collection restriction, but the preliminary injunction was denied. *Feldman* v. *Ariz. Sec'y of State's Office*, 208 F. Supp. 3d 1074, 1080 (D. Ariz. 2016). Timely appeal was made to the Ninth Circuit, where an *en banc* review granted the injunction four days prior to the general election. *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 367 (9th Cir. 2016). This Court then stayed the injunction following the Ninth Circuit's ruling. *Arizona Sec'y of State's Office v. Feldman*, 137 S. Ct. 446 (2016).

Subsequently, the District Court held a trial on the merits, and ultimately rejected each of the DNC's arguments regarding both the OPP and the law restricting ballot-collection. With respect to the OPP, the District Court found that "the overall number of provisional ballots in Arizona, both as a percentage of the registered voters and as a percentage of the number of ballots cast, has consistently declined." *Reagan*, 329 F. Supp. 3d, at 856. After elaborating an extensive factual record, the court further noted that only 0.15% of ballots in the 2016 election were cast in the wrong precinct. Overall, 99.5% of nonminority voters and 99% of minority voters that voted in-person did so at the correct precinct location. These figures were supplemented with survey results that showed 94% of Arizona citizens considered it "very easy" or "somewhat easy" to locate their precinct polling locations. *Id.*, at 859. As such, the District Court held that the OPP did not create "a meaningful inequality in the opportunities of minority voters as compared to non-minority voters to participate in the political process and elect their preferred representatives." *Id.*, at 871.

On the question of Arizona's ballot-collection restriction, the District Court emphasized there were "no records [submitted] of the numbers of people who, in past elections, have relied on" third-party ballot collectors. *Id.*, at 866. Further, there was "no quantitative or statistical evidence comparing the proportion

that is minority versus nonminority" of voters relying on third-party collectors. *Id*. Without rigorous statistical evidence of the impact on minority voters, the court concluded that the ballot-collection restriction does "not impose burdens beyond those traditionally associated with voting." *Id.*, at 871. Thereafter, the court also noted that the restriction "does not deny minority voters meaningful access to the political process simply because [it] makes [returning early ballots] slightly more difficult or inconvenient for a small, yet unquantified subset of voters." *Id*.

The District Court then moved on to consider whether the ballot-collection restriction evinced intentional discrimination, thus violating § 2 of the Fifteenth Amendment. Although the record revealed some supporters of H.B. 2023 relied on "partisan motives" or "a misinformed belief that ballot collection fraud was occurring," this was not sufficient to taint the entire legislative process. *Id.*, at 882. A majority of the bill's proponents "were sincere in their belief that ballot collection increased the risk of early voting fraud, and that H.B. 2023 was a necessary prophylactic measure." *Id.*, at 879. Therefore, it cannot be concluded that the bill "was enacted with a racially discriminatory purpose" or out of "a desire to suppress minority voters," in violation of the Fifteenth Amendment. *Id.*, at 882.

On appeal, the Ninth Circuit permitted private petitioners, the Arizona Republican Party, to act as intervenor-defendants as well as the Arizona Attorney General, Mr. Mark Brnovich, to intervene on behalf of the state. A divided panel of the Ninth Circuit affirmed the District Court's ruling. But in a rehearing of the case *en banc*, the court reversed.

The Court of Appeals deployed a two-step analysis to determine whether the OPP or the ballot-collection restriction violated § 2 of the VRA. This test asked at its first step whether "more than a de minimis number of minority voters" were "disparately affected" by the two Arizona voting practices at issue. *Democratic Nat'l Comm.* v. *Hobbs*, 948 F.3d 989, 1015 (9th Cir. 2020) (en banc). At its second step, the Ninth Circuit's test determined whether the voting practices could be "linked to social and historical conditions" that had perpetuated inequality. *Id.*, at 1016. Beginning with the OPP, the majority rejected the District Court's approach to step one and its claim that too few individuals had been affected by the policy. As a second component of step one, the Court of Appeals also noted that the causation standard applied by the lower court was erroneous. Respondent DNC "need only show that the result of

entirely discarding ballots has an adverse disparate impact, by demonstrating a causal connection between the challenged voting practice and a prohibited discriminatory result." *Id.*, at 1016. This causal standard was met by the DNC's showing that the OPP had discarded twice as many minority ballots as nonminority ballots. Step two of the § 2 analysis considered whether the OPP was "linked" to social and historical discrimination in the state of Arizona, consulting the factors outlined in *Thornburg* v. *Gingles,* 478 U. S. 30, 36 (1986), for guidance. The court's review of the factors concluded that the OPP was indeed "linked" to social and historical conditions of inequality, thereby violating § 2.

As applied to Arizona's ballot-collection restriction, the Ninth Circuit held that step one of the test was satisfied given the showing of "extensive and uncontradicted evidence" that "third parties collected a large and disproportionate number of early ballots from minority voters." *Hobbs*, *supra*, at 1032. Testimony from witnesses closely involved in ballot collection corroborated this finding. *Id.*, at 1033. At step two of the § 2 test, the court once more consulted the *Gingles* factors and established a "link" to social and historical conditions of inequality. Observing that "[n]o one has ever found a case of voter fraud connected to third-party ballot collection" in Arizona, the court surmised that suspicions of voter fraud were manufactured by H.B. 2023 "proponents, who used false statements and race-based innuendo to create distrust" in the system. *Id.*, at 1035.

Lastly, the Court of Appeals addressed whether the ballot-collection restriction violated § 2 of the Fifteenth Amendment. After surveying the factors outlined by this Court in *Village of Arlington Heights* v. *Metro. Housing Dev. Corp.*, 429 U. S. 252, 266-268 (1977), the Ninth Circuit held that the District Court "discounted the importance" of certain factual findings, and that "well-meaning legislators were used as 'cat's paws.'" *Hobbs*, *supra*, at 1041. The court concluded that during debate on H.B. 2023, legislators "were used to serve the discriminatory purposes of Senator Shooter, Republican Chair LaFaro, and their allies," and had been "[c]onvinced by the false and race-based allegations of fraud." *Id.* Both then-Senator Shooter's statements and the LaFaro video proved race was "a 'substantial' or 'motivating' factor behind enactment of the law." *Hunter* v. *Underwood*, 471 U. S. 222, 228 (1985).

Following appeal, Arizona Secretary of State, Ms. Katie Hobbs, reversed her position and argues in support of

Respondent, DNC. We granted certiorari, consolidating the case with *Arizona Republican Party* v. *Democratic Nat'l Comm.*, 141 S. Ct. 221, 207 (2020), and now reverse.

II.

A.

We begin, naturally, with the text. Section 2(a) of the VRA provides, in relevant part, the prohibition that is object of the statute: any "qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301. As an elaborative gloss on this text, § 2(b) exists to clarify what constitutes a violation of § 2(a). Considering "the totality of the circumstances," one must inquire whether the practice or policy at issue leads to an electoral process that is "not equally open to participation by members of a class of citizens." The text of § 2(b) further expounds the term "not equally open," defining it to mean "members [of a protected class] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

The 1982 congressional amendment of the statute added § 2(b) and included the language "results in denial or abridgement" in § 2(a) to settle definitively that the Act does not require intentional discrimination—its focus is on result. As such, "proof of intent is no longer required to prove a § 2 violation." *Chisom* v. *Roemer*, 501 U. S. 380, 394 (1991). However, in permitting a focus on result—or disparate impact liability—§ 2 articulated an express limitation: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." This language, introduced by Senator Bob Dole during the legislative process, came to be known as the "Dole Compromise" and was essential to the ultimate ratification of the bill. Racial proportionality in voting, then, is not the promise of the VRA; instead, it protects "opportunity." The plain meaning of "opportunity" buttresses this reading—it is "a time, condition, or set of circumstances" that "permit[s] . . . a particular action." Oxford English Dictionary (2d ed. 1989). Indeed, "opportunity" denotes the *availability* of "the political process," but does not *mandate* proportional participation in that process.

Both the private petitioner and the DNC misunderstand what is required for the threshold question of § 2, namely, the degree of disparate result needed to state a claim. Private petitioners argue that "race-neutral regulations of the where, when, and how of voting do not implicate § 2," period. Priv. Pet. Br., at 36. This position sits at one pole, far too protective of defendants and out-of-step with the text of § 2(b), which centers the inquiry on the degree to which a voting practice or policy creates "less opportunity . . . to participate in the political process and to elect representatives of their choice." One need not stretch the imagination to envision a time, place, or manner restriction which, though racially neutral in its explicit terms, evinces a disparate effect that limits the "opportunity" to vote for minority voters. For instance, consider a voting regulation that places all polling locations in country clubs throughout the state. None of the clubs deny entrance to an individual based on race. Yet a statistical showing indicates that minority voter turnout decreased by 40% while nonminority turnout decreased by only 1%. Clearly, the mere fact that the regulation is a time, place or manner restriction does not save this practice from § 2 violation. To condone such a practice would defang § 2 of the VRA and rework its threshold inquiry to prohibit only explicit, *intentional* discrimination. But § 2 is a *results* test, and we decline to contort its meaning to hold otherwise.

By contrast, the DNC's position—as well as that of the Ninth Circuit—sits at an opposite pole, one in which a bare showing of disparate effect implicates § 2. Though Respondents aptly note "[n]either § 2's text nor relevant precedent suggest that a minimum threshold of voters must be affected before a disparate burden may be found," a mere "de minimis" standard proves too expansive. St. Resp. Br., at 15. "No state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system," and as such, statistical disparities between races exist in virtually every facet of the electoral system. *Frank* v. *Walker*, 768 F.3d 744, 754 (7th Cir. 2014). Though perhaps susceptible to a bare showing of statistical disparity, § 2 would not inoculate citizens against the "usual burdens of voting." *Crawford* v. *Marion Cty. Election Bd.*, 553 U. S. 181, 198 (2008).

Ultimately, the proper construction of step one in a § 2 analysis of a vote denial case lies between these two poles and hews closely to the language of the statute. To satisfy this step one inquiry, a plaintiff must demonstrate not only a disparate impact affecting minority voters but also that the alleged

practice is of a kind that creates "less opportunity" to "participate in the political process." The compromise reached by legislators in the 1982 amendment of § 2 dismissed language that "would prohibit all discriminatory 'effects' of voting practices," and instead chose language to connote "equal 'access' to the political process." *Mississippi Republican Exec. Comm.* v. *Brooks*, 469 U. S. 1002, 1010-1011 (1984) (Rehnquist, J., dissenting). Further, since § 2 safeguards "the right of any citizen of the United States *to vote*," the inquiry must also look beyond the individual practice to other alternatives that would preserve "access" to the electoral system. 52 U.S.C. § 10301 (emphasis added). This comports with our reasoning in *Holder* v. *Hall*, 512 U. S. 874, 880 (1994) (plurality opinion), which prompts one to contemplate "a reasonable alternative practice as a benchmark against which to measure the existing voting practice" in a § 2 case.

B.

Turning to the second step of the two-part § 2 test, we address the lower court's application of the "totality of circumstances" and the causal standard that requires only a "link" between a disputed voting practice and "social and historical conditions" of inequality. First, we hold that the disputed voting practice must be a *proximate cause* of the alleged disparate impact. Second, we offer guidance as to the appropriate application of the "Senate Factors," named in *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), to this causal determination.

***

Across the circuit courts, recent vote denial cases under § 2 have revealed a troubling pattern: when the court identifies a racial disparity at step one of the test, the step two requirement of a "link" to "social and historical conditions" of inequality has nearly always been met.[1] See Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566, 1592 (2019). The almost one-to-one correlation between the two steps of the test seems rather expected against the backdrop of

[1] Only a single district court in North Carolina did not establish this "link" in step two; however, on appeal to the Court of Appeals of the Fourth Circuit, the judgement was reversed precisely because the court ultimately found such a "link." See N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 233 (4th Cir. 2016).

racial inequality in the history of the United States. It is an unfortunate truth that discrimination has played a role in education, socioeconomic status, and the geographic distribution of minority citizens. And because of this truth, nearly all changes in procedure that create an ordinary burden of voting necessarily prove more troublesome for minority voters compared to nonminority voters. The factual realities of discrimination mean the causal requirement as interpreted by the Ninth Circuit—and various other courts—has collapsed the § 2 two-step inquiry into a single step.

Respondents argue that the "Senate Factors" limit valid § 2 claims to only those which "interact[] with social and historical conditions," and through that interaction, cause a "racial inequality in the opportunity to vote." St. Resp. Br., at 32. A distinct advantage of the test, they state, is that it accounts for "contextual factors that are 'closely linked to the effects of discrimination.'" *Id.*, at 34. Yet the "context of discrimination" is precisely the kind of ubiquitous feature that would be ill-suited to filter any of the claims that surpassed the step one threshold of the two-step § 2 test. Every state in this country has a fraught relationship with racial inequity, thereby opening up virtually any voting practice to § 2 violation. Given the existing record across circuit courts, the "Senate Factors" have not served as a limiting principle in vote denial claims.

Our discussion of the history and amendment of § 2, as well as the plain meaning of the text, decry the establishment of a veiled proportionality requirement. As such, the words of § 2 cannot bear the Respondents' interpretation that permits such a collapse of the two-step test. A causal standard more exacting than a mere "link" is required; however, the precise nature of that standard is less obvious. In cases where the statutory text indicates a causation requirement, but does not clearly define it, we look to context to determine the standard. *Husted* v. *A . Philip Randolph Inst.*, 138 S. Ct. 1833, 1842 (2018) ("When a statutory provision includes an undefined causation requirement, we look to context to decide whether the statute demands only but-for cause as opposed to proximate cause or sole cause.").[2] Section 2(a) prohibits practices that "result[] in a denial or abridgement" of the right to vote "on account of"

[2] The Court of Appeals rejected the District Court's causation analysis in its review of step one of the two-part § 2 test. *Hobbs*, 948 F.3d, at 1016. This seems to indicate that the Court of Appeals considered causation in step one as well as in its assessment of the "link" to historic patterns of inequity in step two. *Id.* However, the appropriate location for this causation inquiry is wholly within step two of the test, where the *Gingles* factors may inform the proximate cause determination. See *infra*, at 11-12.

race, color, or linguistic minority status. "Result" and "on account of" possess plain causal meaning, but we look to § 2(b) for greater specificity. Mention of "political processes" eliminates "sole cause" as a prospective standard since the text advocates for a wholistic view of the electoral system, a tenet we clarified in our interpretation of step one in the two-step § 2 test. "But-for" cause would comport with the basic causal terms in § 2(a), however, this cannot be the proper reading of the statute as it would implicate far too many practices that Congress understood as appropriate at the time of ratification. In 1982—the year of the amendment's passage—many states offered a much more limited suite of voting options compared to today. Often, the voting avenues were either in-person voting on Election Day or "limited excuse absentee-voting." U.S. Br., at 22. If the causal nexus of step two in the § 2 test were but-for cause, many of those voting policies could readily be swept up by § 2 prohibition due to the socioeconomic disadvantage that disproportionately affects minority voters.

"Proximate cause," then, remains as the most likely standard of causation required by the text and history of the statute. To avoid interpreting § 2 to permit racial proportionality in voting, we must adopt a "robust causality requirement" that "protects defendants from being held liable for racial disparities they did not create." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 576 U. S. 519, 542 (2015). If § 2 held a government defendant liable for any of the myriad statistical disparities present between minority and nonminority voters, constitutionally infirm race-conscious legislating would abound. See *Id.* Legislators would be encouraged to consider existing and future voting disparities in accordance with a voter's race or color, a practice that "place[s] a racial thumb on the scales" of the legislative process. *Ricci* v. *DeStefano*, 557 U. S. 557, 594 (2009) (Scalia, J., concurring). Time and again, this Court has rejected the "sordid business" of "divvying us up by race," *League of United Latin Am. Citizens* v. *Perry*, 548 U. S. 399, 511 (2006) (Roberts, C.J., concurring), and a proximate cause standard ensures that § 2 remains on the lighted path.

***

Returning once again to the text, § 2(b) states that in determining whether a violation of subsection (a) has occurred, the decision must be "based on the totality of circumstances."

As a gloss to what constitutes "a denial or abridgement of the right . . . to vote on account of race or color," the language of § 2(b) applies the "totality of circumstances" analysis to the proximate cause requirement established in Subsection (a). How one ought to apply this "totality of circumstances" analysis proves more elusive.

This Court's most extensive treatment of the question occurs in *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), where nine "Senate Factors" were derived from a report by the Senate Judiciary Committee that accompanied § 2's amendment. In deciding the case at bar, the Ninth Circuit applied the Senate Factors at step two of the §2 test as they were applied in *Gingles*. However, the Court of Appeals did not account for essential factual distinctions present in this case, nor of this Court's own circumspect language about applying *Gingles* broadly.

The issue before this Court in *Gingles* was particular and fact-specific; namely, the application of § 2 to "vote dilution through submergence in multimember districts." *Id*., at 48. Even within this narrow issue, the majority further circumscribed the application of its opinion. See *Id.*, at 46 n.12 (noting there was "no occasion" to consider subsets of the issue involving "multimember districts" or a minority group "that is not sufficiently large and compact to constitute a majority" in its single-member district). As a vote-dilution case, *Gingles* offers many caveats to its holding, and as applied to a vote denial claim, still greater caution should be maintained when generalizing its ruling. By the Senate Judiciary Committee's own language, a vote denial claim "would not necessarily involve the same factors" as a vote dilution claim. S. REP. NO. 97-417, at 30 (1982). The Senate Factors were not meant to act as a rigid rubric; their purpose is that of an aid, one that is "pertinent to certain types of § 2 violations, particularly to vote dilution claims," but that "other factors may also be relevant and may be considered." *Gingles*, 478 U. S., at 45.

Recognizing the flexibility provided for in *Gingles*, we therefore affirm the utility of the Senate Factors in adjudicating a vote denial claim; however, we offer additional clarification on how such factors apply *differently* to such a case. Though all relevant circumstances may be brought to bear on the decision, a vote denial case warrants special attention to "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is

tenuous." *Id.*, at 37. Though "[p]roximate cause is an elusive concept," *Husted, supra*, at 1843, an analysis of the government's interest in the policy can help delineate the bounds of this causation—to wit, those disparate effects for which the government is rightly held responsible. This inquiry draws from our other disparate impact jurisprudence[3] as well as our reasoning in *Houston Lawyers' Ass'n* v. *Attorney Gen.*, 501 U. S. 419, 426 (1991), which deemed a state's interest as a "legitimate factor to be considered."

When a plaintiff successfully alleges that a policy or practice creates "less opportunity" to participate in the political process, the second step of § 2's test prompts the court to weigh this against a state's legitimate race-neutral interests. The totality-of-circumstances approach allows for discretion in appraising how "tenuous" the state's reasoning is for a voting practice and whether said practice is rightly tailored or attuned to that interest. From there, further balancing against the plaintiff's demonstrated racial disparity as well as the effect on voting "opportunity" will provide a basis for the state's liability as proximate cause of the unequal "result." Disparate impact liability targets those "artificial, arbitrary, and unnecessary barriers" that threaten the fairness and openness of democratic elections. *Inclusive Communities*, 576 U. S., at 540. But if we are to avoid transgressing the Equal Protection Clause's "central mandate" of "racial neutrality in governmental decisionmaking," we must adhere to a robust review of the circumstances and of cause. *Miller* v. *Johnson*, 515 U. S. 900, 904, 916 (1995).

III.

Having elaborated the proper construction of § 2's two-step test, we examine the two Arizona voting practices before us: the out-of-precinct policy (OPP) and the ballot-collection restriction. We hold that neither practice violates § 2 of the VRA.

A.

Respondents provided uncontested statistical and other evidence that minority voters cast ballots outside their proper precinct "at twice the rate of white voters." *Hobbs*, *supra*, at

[3] See *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971); *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U. S. 519 (2015); *Smith v. City of Jackson*, 544 U. S. 228 (2005).

1014. The factual record was further developed with evidence that Latinx and Native American voters have "higher rates of residential mobility" compared to white non-Hispanic voters. *Reagan*, *supra*, at 872. Under step one of the § 2 two-step results test, we ask whether the practice at issue has created "less opportunity" to vote, taking into account plausible alternative practices available to voters. Respondents neither alleged nor proved that minority voters were less able to correctly identify their respective precinct voting location. Further, they did not submit evidence that the state had acted in a way that prevented minority voters from acquiring that information or arriving at the correct polling location. As to the existence of other plausible, alternative voting practices, it is clear that voters can access the much more popular practices of mail-in or early voting.

The Ninth Circuit's opinion closely analyzed the number of minority votes discarded in relation to those of nonminority voters. Whether 3,709 ballots is enough to swing an election or not, the number itself is not the "result" contemplated by § 2. Surely, the number of ballots affected by a voting policy may have some bearing on the step one analysis, but an overemphasis on that statistical showing would verge on the proportionality reasoning that the text of § 2 explicitly rejects. By its terms, § 2(b) defines the forbidden "result" as "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Both the District Court and the Court of Appeals disagree over the significance of 3,709 ballots, and understandably so, because without connection to the relevant inquiry of "opportunity" to vote, the number lacks context. To properly develop that context, a plaintiff cannot cite numbers in a vacuum and presume those numbers speak for themselves. One must demonstrate *how* the number of ballots bears on the "opportunity" to vote within the electoral process if they are to prove a violation of § 2. Here, the small number of ballots as a fraction of the total votes cast in Arizona buttresses the observation that a plethora of alternative voting methods exist—methods available to and utilized by the lion's share of minority voters across the state. The "opportunity" to vote remains intact.

Even if we were to find that the OPP satisfied step one of the § 2 results test, the practice would fail step two's requirement of proximate cause "based on the totality of circumstances." Rejecting the District Court's conclusion, the

Court of Appeals reasoned that "[p]laintiffs need not show that Arizona caused them to vote out of precinct. Rather, they need only show that the result of entirely discarding [out-of-precinct] ballots has an adverse disparate impact, by demonstrating "a causal connection between the challenged voting practice and a prohibited discriminatory *result*." *Hobbs, supra*, at 1016. But, as Judge O'Scannlain's dissent notes, the majority mistakes "the burden of complying with the precinct-based system" for "the consequence imposed should a voter fail to comply." *Id.*, at 1053 (O'Scannlain, J., dissenting). Respondents target only the component of the OPP that discards votes cast in an improper precinct. Here, they confuse the framing of their own argument. When alleging that the number of minority votes discarded is disproportionate, the comparator they deploy is the total number of votes—by both minority and nonminority voters—cast at the precinct. With this framing, the fact that a greater proportion of the discarded votes were cast by minority voters, especially given the majority of voters in the precinct were white, warrants scrutiny. However, the appropriate frame is not total votes cast at the precinct, but rather total votes *improperly* cast. Respondents proffered no evidence that of the out-of-precinct ballots cast at a given precinct, minority voters had their ballots discarded disproportionately compared to nonminority voters. Should the racial makeup of improperly cast votes be directly proportional to the racial makeup of votes discarded, then one cannot say there is a "discriminatory result."

If Respondents wished to use the framing of all votes cast at the precinct, then their argument would necessarily be that a disproportionate number of minority voters cast ballots in the wrong precinct. However, this was not the Respondents' chosen path, and they "offered no evidence of a systemic or pervasive history of minority voters being given misinformation regarding the locations of their assigned precincts, while nonminority voters were given correct information." *Reagan*, *supra*, at 873. Nor did they "show[ ] that precincts tend to be located in areas where it would be more difficult for minority voters to find them, as compared to nonminority voters." *Id*.

Further, the majority accepted the Respondents' claim challenging *only* the element of the OPP that involves discarding the ballots cast by voters from the wrong precinct, and not the entirety of the precinct voting system. But this position is untenable; "partially counting" a vote requires the same investment of resources and delay that "counting" a vote

entails, if not more. And though the Court of Appeals was not persuaded by the reduction in "delay and expense" that justifies the OPP, we are. *Hobbs*, *supra*, at 1031. This issue bears directly on the totality-of-circumstances analysis that complements the finding of cause. The Ninth Circuit's opinion disregarded numerous race-neutral justifications for the OPP, including: greater ballot security, greater flexibility in locating polling places close to citizens, simplified ballots that feature only elections in which a voter is eligible to participate, and as evinced by the ongoing global pandemic, the ability to reduce crowding at polling stations. Causation and the totality of circumstances favor the state Petitioner.

B.

With respect to A.R.S. § 16-1005 that restricts ballot collection activities, step one of the §2 two-step results test prompts us to consider whether the restriction leaves minority voters with "less opportunity" to vote—accounting for both the restriction itself and the ecosystem of available voting alternatives. Respondents submitted witness testimony that minority voters were "generally more likely" to use third-party ballot collectors. The District Court, however, observed that Respondents had produced "no records of the numbers of people who, in past elections, have relied on" third-party ballot collectors, and "no quantitative or statistical evidence comparing the proportion that is minority versus nonminority." *Reagan*, *supra*, at 845. Even assuming that a significant number of minority voters used a third party to collect their ballots, "the vast majority of voters who choose to vote early by mail do not return their ballots with the assistance of a third-party collector who does not fall within H.B. 2023's exceptions." *Id*. Respondents also presented evidence about disparities in access to home mail service, particularly among Native Americans, of which only 18% had consistent access. *Id.*, at 836.

Combined, this evidence indicates that minority voters may choose different voting methods than nonminority voters, but it does not evince "less opportunity" to vote. First, the mere fact that minority voters may be more likely than nonminority voters to use third-party ballot collection says nothing about the magnitude of either group's use. Without the statistical evidence showing quantity, it becomes impossible to determine the extent to which this difference rises to impinge on "opportunity." Second, the ballot-collection restriction is not a

complete ban, and Respondents' evidence that minority voters more frequently use third parties to deliver their votes does not specify the identity of the third party. As the District Court noted, various individuals may legally submit a ballot on behalf of another, including: election officials, mail carriers, family or household members, or caregivers. Third, evidence indicating disparities in access to home mail service does not support a finding that minority voters could not easily cast a ballot in-person at a voting center or precinct voting location. Indeed, none of the witnesses proffered by the Respondents "testified that H.B. 2023's limitations on who may collect an early ballot would make it significantly more difficult to vote." *Id.*, at 871. Given the suite of voting options available in the state of Arizona, Respondents failed to present sufficient evidence to conclude that minority voters had less opportunity to vote under A.R.S. § 16-1005.

Were we to find that Respondents satisfied the required showing under step one, the second step of § 2's results test would once again fail to establish the requisite proximate causation standard, "based on the totality of circumstances." The tenuousness factor derived from *Gingles*, plays an essential role in balancing race-neutral justifications for a voting policy with disparate effect that reduces the "opportunity" to vote. By evaluating the connection between the government's policy interests and the disputed voting practice, the tenuousness factor empowers the court to protect legitimate purposes while sifting out "artificial, arbitrary, and unnecessary barriers." As today's decision makes clear, this aligns our § 2 jurisprudence with analogous domains of disparate impact law. Here, the *en banc* majority disregarded the legislature's interest in prophylactic measures against voter fraud. Though it is true that "[n]o one has ever found a case of voter fraud connected to third-party ballot collection" in Arizona, this does not obviate the state's interest. *Hobbs*, *supra*, at 1035. Guidance from the bipartisan Carter-Baker Commission's report zeroed in on mail-in voting practices as those most ripe for voter fraud. *Reagan*, *supra*, at 855. And despite the lack of voter fraud evidence in Arizona, other states have seen fraud corrupt recent elections. In particular, Petitioners point to North Carolina's 2018 congressional race, where ballot-collection fraud upended the election. *Id.*, at 861. This Court does not see fit to mandate the point at which state governments may appropriately consider taking prophylactic measures; fraud need not have arrived at Arizona's doorstep to

warrant serious consideration. Disparate impact liability is designed to suss out "artificial, arbitrary, and unnecessary barriers," those policies without a legitimate, substantial state interest. *Inclusive Communities*, *supra*, at 540. The Arizona ballot-collection restriction does not fall within that ambit.

IV.

We next turn to the second issue before us, namely whether "discriminatory intent" of a legislature may be proven by way of the "cat's paw doctrine." Respondents allege that Arizona's ballot-collection restriction, known as H.B. 2023 during the ratification process, was enacted by the state legislature with discriminatory intent, thus violating § 2 of the Fifteenth Amendment. The District Court "f[ound] that H.B. 2023 was not enacted with a racially discriminatory purpose." *Reagan*, *supra*, at 879. On appeal, the *en banc* majority of the Ninth Circuit reversed, finding that race was, indeed, a "motivating factor" behind the passage of H.B. 2023. *Hobbs*, *supra*, at 1039. Further, it held that "well-meaning legislators were used as 'cat's paws'" to effect the discriminatory intentions of other legislators. *Id.*, at 1041. We now reverse this judgement of the Ninth Circuit.

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To support a finding of intentional discrimination, this Court outlined a non-exhaustive list of relevant factors in *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U. S. 252 (1977). To wit, four evidentiary sources prove fruitful: "(1) the historical background; (2) the sequence of events leading to enactment, including any substantive or procedural departures from the normal legislative process; (3) the relevant legislative history; and (4) whether the law has a disparate impact on a particular racial group." *Hobbs*, *supra*, at 1038 (citing *Arlington Heights*, 429 U. S., at 266-268).

Upon review of the record, the District Court determined that then-State Senator Shooter's racialized comments, and the LaFaro video that had been circulated, did not taint the legislative process with discriminatory intent. *Reagan*, *supra*, at 879. Though these two factors may have individually exhibited a racially biased intent, "the legislature as a whole enacted H.B. 2023 *in spite of* opponents' concerns about its

potential effect on [get-out-the-vote] efforts in minority communities, *not because* of that effect." *Id.*

On appeal, the *en banc* majority disturbed the District Court's factual finding on this issue, particularly with respect to the inquiry into legislative history. *Hobbs*, *supra*, at 1039. Returning to then-Senator Shooter's comments, the court emphasized that the "unfounded and often farfetched allegations of ballot collection fraud" indicated a sincere "desire to eliminate" the increasingly effective efforts to ensure that Hispanic votes in his district were collected, delivered, and counted." *Id.*, at 1040. Coupled with the widespread consumption of the LaFaro video, the court placed considerable weight on the District Court's finding that both factors had been "successful in convincing H.B. 2023's proponents that ballot collection presented opportunities for fraud that did not exist for in-person voting." *Id.*

The critical point of divergence between the District Court and the Court of Appeals turns on the legislators' sincerity. While both concede that many had a sincere "non-race-based belief that there had been fraud in third-party ballot collection," the Ninth Circuit alone pushes further. *Id.*; see also *Reagan*, *supra*, at 882. Introducing the "cat's paw" doctrine from employment liability, the court claims the "non-raced-based belief" of some legislators was corrupted by the discriminatory intent of then-Senator Shooter. Named for an Aesopian fable, the "cat's paw" doctrine allows one to impute the motives of a supervisor to an employer. The fable involves a crafty monkey manipulating a cat into procuring chestnuts from coals too hot for his simian grasp. By way of analogy, the majority saw the image of the crafty deceiver in then-Senator Shooter, his fellow legislators, mere cats chasing chestnuts.

Though evocative, we find the *en banc* majority's reasoning unavailing and its application of the cat's paw doctrine inapposite.

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"[I]njected into United States employment discrimination law by Judge Posner in 1990," the cat's paw doctrine is used "to hold [an] employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision." *Staub* v. *Proctor Hosp.*, 562 U. S. 411, 415 n.1 (2011). The doctrine most appropriately describes a vertical employment relationship involving "delegated" authority

between individuals or entities. *Id.*, at 421-422. And therein lies the Court of Appeals' simple mistake: there is no vertical relationship among co-equal members of a legislative body. None of the legislators delegated their authority to then-Senator Shooter, nor could his individual intentions be attributed to the legislature as a whole, over which he has no control. Reliance on the cat's paw theory, as noted by Judge O'Scannlain, "is misplaced because, unlike employers whose decision may be tainted by the discriminatory motives of a supervisor, each legislator is an independent actor, and bias of some cannot be attributed to all members." *Hobbs*, *supra*, at 1059 (O'Scannlain, J., dissenting).

Such a theory has no place in divining the intent of the legislature. The District Court's finding that supporters of H.B. 2023 had a sincere "non-race-based belief that there had been fraud in third-party ballot collection," is enough to defeat the allegation of discriminatory intent in violation of § 2 of the Fifteenth Amendment. For now, the monkeys must gather their own chestnuts.

The judgement of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

Christian Soler

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Journal(s)	**ILJ; HBLR**
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 19, 2023
The Honorable Casey Pitts
United States District Court for the Northern District of California
J Robert F. Peckham Federal Building
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280 South 1st Street, Room 2112
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Dear Judge Pitts:

I am writing to your chambers to apply for your next available clerkship position. I am also open to clerking during any available term. I recently graduated from Harvard Law School, where I developed a solid foundation in legal research, writing, and analysis. Although I attended school in Cambridge, Massachusetts, I am originally from San Jose, California, and my family continues to reside there. I hope to return to California to practice law.

During my time at Harvard Law School, I had the privilege of serving as a judicial intern for the Honorable Chief Judge Saylor at the United States District Court for the District of Massachusetts. This experience provided me with firsthand exposure to the courtroom proceedings and opportunities to hone my ability to conduct thorough legal research. Among other things, I drafted motions to dismiss, orders of excludable delays, jury instructions, voir dire questions, bench memorandums. Enclosed please find my resume, law school transcript, undergraduate transcript, and writing sample. My references are below:

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If there is any other information that would be helpful to you, please let me know. Thank you for your time and consideration.

Sincerely,

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Enclosures

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UCLA Law Fellows Program
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U.S. Securities and Exchange Commission, Boston, MA
SEC Spring 2023 Scholars Program Intern
- Performed background research and conducted research on the amended Advisers Act Rule 206(4)-1 (Marketing Rule)
- Examined investment advisors' materials and policies to ensure compliance with the Investment Advisor Act of 1940
- Led interview with external auditors to understand their procedures for asset verification and confirmation process

Ropes & Gray, San Francisco and Los Angeles, CA
Summer Associate, May 2021 – Jul 2021 and Jul 2022
- Researched and summarized asylum and convention against torture (CAT) cases for domestic violence survivors
- Assisted associates with project management and performed due diligence for private equity and M&A deals
- Completed secondment with asset manager with $1+ trillion in AUM focusing on private equity, 40 Act, and derivatives

Latham & Watkins, Los Angeles, CA
Summer Associate, May 2022 – Jul 2022
- Researched case law on various topics including rules of evidence, Revlon duties, deal protection mechanisms, and discovery
- Drafted a motion to quash third-party subpoena and a legal memorandum analyzing evidentiary issues
- Drafted non-disclosure agreements, prepared disclosure schedules, and prepared bid price comparison for M&A deals

U.S. District Court for the District of Massachusetts, Boston, MA
Intern, Dec 2021 – Apr 2022
- Analyzed legal arguments, drafted sections of memorandum and order on motions to dismiss, and performed citation checks
- Prepared bench memorandums, excludable delay orders, jury verdict forms, and voir dire questions

California Attorney General's Office, San Francisco, CA
Intern, Sept 2021 – Apr 2022
- Conducted legal research on Westlaw and LexisNexis on complex legal issues, including constitutional and criminal matters
- Drafted respondent's briefs for the Appeals, Writs and Trials Section of the Criminal Division

Ernst & Young, Los Angeles, CA
Transactions Advisory Services Manager, Sept 2019 – Oct 2020
- Managed $700 million spin-off and divestiture project for Fortune 500 public retail company
- Reviewed transaction analytics and drafted carve-out financials for tech client with $1.2 billion in revenue
- Managed financial due diligence engagements: divestitures, carve-outs, spin-offs and sell-side diligence

Deloitte & Touche, Los Angeles, CA
Advisory Manager, Oct 2012 – Sept 2019
- Managed 120+ member engagement team across the US and India for a client with $2.3+ trillion in assets
- Managed workstreams for a $1 billion initial public offering, developed training materials, and reviewed S-1 filings
- Evaluated impact of new accounting standards to draft white papers for 2nd largest internet and retail company
- Collaborated with leadership on eminence, published articles, client pursuits, and training materials under GAAP and IFRS
- Provided advice on technical accounting and SEC reporting requirements topics: embedded derivatives, hedging, consolidation, true sale opinions, business combination, securitization, and mergers and acquisitions

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Harvard Law School

Date of Issue: June 2, 2023
Not valid unless signed and sealed
Page 1 / 2

Record of: Tram N Tran
Current Program Status: Graduated
Degree Received: Juris Doctor May 25, 2023 Cum Laude
Pro Bono Requirement Complete

JD Program

Fall 2020 Term: September 01 - December 31

1000	Civil Procedure 3 Clark, Bradford	P	4
1001	Contracts 3 Lessig, Lawrence	P	4
1002	Criminal Law 3 Kamali, Elizabeth Papp	P	4
1006	First Year Legal Research and Writing 3B Barrow, Jennifer	H	2
1003	Legislation and Regulation 3 Stephenson, Matthew	P	4

Fall 2020 Total Credits: 18

Winter 2021 Term: January 01 - January 22

1051	Negotiation Workshop Goldstein, Deborah	CR	3

Winter 2021 Total Credits: 3

Spring 2021 Term: January 25 - May 14

1024	Constitutional Law 3 Bowie, Nikolas	P	4
2936	Fashion Law Lab Sarian, Nana * Dean's Scholar Prize	H*	2
1006	First Year Legal Research and Writing 3B Barrow, Jennifer * Dean's Scholar Prize	H*	2
1004	Property 3 Brady, Maureen	P	4
1005	Torts 3 Gersen, Jacob	H	4

Spring 2021 Total Credits: 16
Total 2020-2021 Credits: 37

Fall 2021 Term: September 01 - December 03

2452	Constitutional Law: Money and the Making of American Capitalism Desan, Christine	H	4
2048	Corporations Fried, Jesse	H	4
8034	Housing Law Clinic McDonagh, Maureen	H	4
2199	Housing Law Clinical Workshop McDonagh, Maureen	H	2
2505	Supreme Court Decision Making Singer, Joseph	H	2

Fall 2021 Total Credits: 16

Winter-Spring 2022 Term: January 04 - May 13

8056	Federal Courts Clinic Zimmer, David	H	5

Winter-Spring 2022 Total Credits: 5

Spring 2022 Term: February 01 - May 13

2035	Constitutional Law: First Amendment Feldman, Noah	P	4
3066	Federal Courts Clinical Seminar Zimmer, David	H	1
3011	Framing, Narrative, and Supreme Court Jurisprudence Jenkins, Alan	H	2
7000W	Independent Writing Brady, Maureen	H	2
2212	Public International Law Blum, Gabriella	H	4

Spring 2022 Total Credits: 13
Total 2021-2022 Credits: 34

Fall 2022 Term: September 01 - December 31

2253	Empirical Law and Finance Cohen, Alma	H	1
2079	Evidence Rubin, Peter	H	2
2689	Legal Innovation Through Design Thinking Westfahl, Scott	H	2
3009	M&A Litigation Fried, Jesse	H	2
3014	Supreme Court and Appellate Advocacy Workshop Halligan, Caitlin	H	2
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Harvard Law School

Record of: Tram N Tran

Date of Issue: June 2, 2023
Not valid unless signed and sealed

8031	Transactional Law Clinics Price, Brian	H	5
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2249	Trial Advocacy Workshop Sullivan, Ronald	CR	3
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3035	Global Justice Workshop Blum, Gabriella	H	2
2169	Legal Profession Gordon-Reed, Annette	P	3
3119	Poverty Law Workshop: A Toolkit for Addressing Inequity & Homelessness Gwin, Elizabeth * Dean's Scholar Prize	H*	2
8039	Veterans Law and Disability Benefits Clinic Nagin, Daniel	H	3
	Spring 2023 Total Credits:		16
	Total 2022-2023 Credits:		35
	Total JD Program Credits:		106

End of official record

HARVARD LAW SCHOOL
Office of the Registrar
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Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
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Transcript questions should be referred to the Registrar.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems
Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

RE: Tram Tran

Dear Judge Pitts:

This is a letter of recommendation for Tram Tran, who I understand is applying for a position as a judicial law clerk.

Tram served as an intern in my chambers from January 2022 through April 2022. By way of background, I always have at least two interns in my chambers as a complement to, and extension of, my law clerks. Among other things, my interns help prepare me for conferences and motion hearings; perform legal research; and draft opinions and portions of opinions. Unlike many judges, I normally have daily, substantive contact with my interns.

I am pleased to recommend Tram highly for a judicial clerkship. She is an intelligent and thoughtful young woman, which is reflected in her transcript at Harvard Law School and her other academic achievements. All assignments were performed in a timely manner.

Tram is also a delightful person. She was cheerful, enthusiastic, fun, and fully engaged at all times. I am confident she will be a well-liked, hard-working contributor wherever she is employed.

I would be happy to discuss her candidacy at greater length at any time. Please let me know if I can be of further assistance.

Sincerely yours,

/s/ F. Dennis Saylor IV

F. Dennis Saylor IV
Chief Judge, United States District Court

FDS/jp

June 19, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am delighted to recommend Tram Tran highly to you for clerkship. I taught Tram Tran in the fall of 2021 in my course on Constitutional Law: Money and the Making of American Capitalism. The course was small by Harvard Law's standards (about 45 students) and class participation was required. That allowed me to get to know Tran Tram well.

Tran Tram is a self-starter in the best sense. She engaged the course with intensity from the beginning; her participation was excellent on all scores. First, she is a born advocate, with great skill for legal analysis, as you will also have noted given her award for "Best Appellate Brief" in the First Year Ames Moot Court competition. Second, she brings exceptional drive to every project she takes on. In my course, she worked intensively on an ambitious paper arguing that Congress pays attention to the Federal Reserve disproportionately in response to crises; that exigency-driven pattern has short-changed the central bank from considered reform. In the paper, Tran Tram then considered the way that the Fed's attempts to meet demands for accountability while remaining independent from partisan influence related to the congressional pattern. Finally, she surveyed judicial attempts to classify the Federal Reserve as public or private, arguing that the hybrid character of the central bank makes it difficult for the courts to be disciplined in their legal judgments.

The paper showcases Tran Tram's commitment to tackle and decode complex doctrinal areas. Tran Tram demonstrates the same commitment outside as well as in classes. As you will note, Tran Tram is active in not one but three law journals: Harvard International Law Journal (Finance Chair), the Harvard Business Law Review (Events & Operations Committee Member; Editor), and the Harvard Journal of Sports & Entertainment Law (Editor), all this while managing to draw a very steep learning curve up, demonstrating excellent accomplishment in her classes. At the same time, Tran Tram has also contributed to the Harvard student body, supporting students from diverse backgrounds.

Tran Tram will bring great talent to your chambers, not to mention enormous energy. She will in turn benefit greatly from the experience you give her, putting it to good use in her lawyering career. I recommend her strongly.

Sincerely,

Christine Desan
Leo Gottlieb Professor of Law
Harvard Law School
(617) 495-4613

June 19, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am writing on behalf of Tram Tran, a rising third-year student here at Harvard Law School, who is applying for a clerkship in your chambers.

I got to know Tram in Fall 2021, when she was a student in my 125-student Corporations course. Tram frequently attended office hours and emailed me about various issues in the course (including catching a mistake in my course materials), so I came to know her quite well. She performed superbly on the (blind-graded) exam, earning a score that put her in the top 10% of the class.

In terms of collegiality, Tram is warm, upbeat, and collaborative with other students. She also has a wonderful sense of humor, which I've enjoyed. I am sure that she would be a pleasure to work with.

Tram has what it takes to be a great clerk. She is smart, hard-working, and gets along well with others. She has a background in economics and accounting, including almost a decade of experience working as an accountant before law school. I imagine this background would be useful in cases involving complex business or regulatory issues. I recommend her highly, and hope you give her application the most serious consideration. If you have any questions, please feel free to contact me.

Sincerely,

Jesse Fried

Jesse Fried - jfried@law.harvard.edu - 617-384-8158

June 19, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am writing in support of the clerkship application of Tram Tran, whom I understand has applied for a clerkship in your chambers.

Tram was a student in my Property course in the spring of her first year. She enrolled in the fall of 2020, when Harvard was fully virtual for COVID, and she distinguished herself as a fierce advocate for herself and her classmates under these circumstances. When the California wildfires were raging and knocking out classroom Zoom sessions for our West Coast section members, it was Tram who organized to push for accommodations for them. Tram came to law school after substantial work experience in business and accounting, and she came ready to take advantage of the opportunity to be back in the classroom. She is not shy about asking questions in class, dropping by office hours, or raising her hand to object to arguments that she views as incorrect or underdeveloped. Although I know that her grade in Property was not as high as she would have liked, I think that Tram does best with time to refine and develop her legal writing. She earned a Dean's Scholar Prize in the first-year Legal Research and Writing course, as well as a prize for the best appellant brief in her section. Further, I have had the opportunity to work with Tram on an independent writing project on whether rights of publicity should be extended to animals (think of pet influencers). Tram is doing an outstanding job on this project, which she has filled with creative writing flourishes and provocative research, and I have enjoyed seeing it come to fruition during her third year.

There is no question that Tram has a strong personality—indeed, that will be apparent as soon as you meet her—but she also has an excellent work ethic and a good nature. She is a first-generation student, and she has pursued numerous leadership roles during her time at Harvard to try to make it a better place for students of many different persuasions. (As just one example, Tram helped raise over $100,000 for the Asian-Pacific-American Law Students Association, nearly twice as much as any prior sponsorship chair of the organization.) She is open-minded, too. Tram is the rare student who as a first year became a member of both the Federalist Society and the American Constitution Society, genuinely interested in debate and understanding. And she is passionate about the causes that she cares about, which range from domestic violence to gun safety to animal rights. Indeed, as a second-year student, Tram developed and designed a line of dog toys where part of the proceeds goes to animal shelters and associated charities—something I am fairly sure will not be true of any other clerkship applicant this year.

In her prior work roles, Tram has described herself as taking initiative, a skill she uses to streamline work and make life easier for those who supervise her. In each legal role that she has pursued to date—in the Housing Law Clinic at HLS, in the California Attorney General's Office, and last year, in Judge Saylor's chambers on the District of Massachusetts—Tram has ably achieved that goal. As just one example, Tram saw an opportunity to take some administrative work away from one of Judge Saylor's clerks by taking on the task of updating status bench memos weekly, an easy way to add efficiency to the chambers work process. Likewise, when I brought Tram on as an emergency research assistant to help me with revisions to my Property casebook, Tram developed a system for providing comments that I have now copied and asked other RAs to follow. That summarizes Tram: she is diligent, efficient, and unafraid to provide feedback on how she thinks things can improve. For the right fit, she would be a terrific asset.

If I can be of further assistance, please contact me.

Sincerely,

Maureen E. Brady

Molly Brady - mbrady@law.harvard.edu - (617) 384-0099

June 19, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

Tram Tran has asked me to write a recommendation in connection with her application for a judicial clerkship. I am happy to do so.

Tram was in a seminar I teach on Supreme Court Decision Making where the students act like the U.S. Supreme Court and as a state supreme court in a dozen cases. They discuss and decide a dozen cases, and they write majority and dissenting and concurring opinions. We do six Supreme Court cases being heard by the Court during the current Term, and we do six made-up problems involving state law in several states, involving common law, statutes, and state constitutional law. The Supreme Court cases involve both statutory interpretation and federal constitutional law. For the federal cases, the students read the lower court opinions, the briefs that are available, and any crucial statutes or cases that are being interpreted by the Court. For the state cases, the students read assigned cases, statutes, and state constitutional provisions, and they write opinions as if they are the supreme court of the relevant jurisdiction.

We discuss each case twice. The first time we pretend we are at conference after oral argument and taking an initial vote on the case, and each student explains whether they would affirm or reverse and what they think an opinion should say. Then the student in charge spends the next two weeks writing a proposed majority opinion; the others write dissenting and concurring opinions. We meet to discuss the case a second time, to discuss the written opinions.

Tram did a fabulous job in the class. She read the background legal materials and briefs very, very carefully and was clear and appropriate in her interpretation of statutes, constitutional provisions, and case law. She listened to the other students, was respectful, changed her mind when she was convinced that she was wrong about something, and wrote her opinions in ways that were geared not only to make the arguments she thought most appropriate but also to speak to the other judges who had different interpretive approaches. Her work, both in the class discussion and in her written opinions, was excellent. She analyzed the legal materials well and spoke in class in a respectful and persuasive manner, making her points forcefully but in a way designed to get others to listen to her.

Tram wrote a proposed majority opinion in a case involving analysis of whether state statutes in Massachusetts prohibit large lot zoning that has a disparate impact on various protected groups under the state fair housing law. The state statutes are oddly worded and very complicated, and she did a great job of textual analysis, use of precedent, and normative arguments relevant to statutory interpretation that are used by Massachusetts courts. She also responded to competing arguments made by other “judges” in the class. I was very impressed with her work. She more than met my expectations, and her performance in the class makes me very confident she would do a great job as a law clerk.

Tram is a first generation immigrant. Her family immigrated to the United States from Vietnam with no money. Her father made a living as a janitor, and her mother cooked Vietnamese foods at home to sell to friends and acquaintances. She is an incredibly hard working person and has great drive and dedication. She takes education seriously and works hard to improve. I saw this first hand in the class. Tram met with me frequently to talk about comments I made on her written work to make sure she understood what I meant so that she could rewrite her opinions to address any issues I thought needed to be addressed differently. She listened to me and met my expectations fully.

I am confident Tram will be an excellent law clerk.

Sincerely,

Joseph William Singer

Joseph Singer - jsinger@law.harvard.edu - 617-496-5292

IN THE UNITED STATES COURT OF APPEALS FOR

THE NINTH CIRCUIT

CRIMINAL ACTION NO. 20-10460

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

V.

ARCHIBALD H. HARK,
DEFENDANT-APPELLANT

BRIEF FOR THE DEFENDANT-APPELLANT

Tram Tran
3801 Eagle Rock Blvd Unit 3
Los Angeles, CA 90065

Jonathan Lu
4736 Steeplechase Drive
Easton, PA 18040

Attorneys for the Defendant – Appellant
Argument:
April 15, 2020, 7:15 p.m.
Team 3B-13

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STATEMENT OF THE CASE

This is an appeal from the denial of: (i) a motion for acquittal based on entrapment as a matter of law and (ii) a motion for a new trial on the grounds of newly discovered evidence made before the United States District Court for the District of Guam. Hark is requesting that this Court reverse the district court by granting the motion for acquittal, or by ordering a new trial.

In the court below, the jury found Hark guilty of distributing heroin on July 9, 2020. Hark moved for an acquittal under Rule 29, alleging entrapment by a DEA agent, and moved for a new trial under Rule 33 on the basis of three newly discovered affidavits. The district court rejected both motions. On July 24, 2020, the district court sentenced Hark to twenty-four (24) months imprisonment; ordered him to pay a $100 special assessment; and required 12 months of supervised release upon his release. Hark filed his Notice of Appeal on July 27, 2020.

QUESTIONS PRESENTED

I. Entrapment is a defense when a defendant was induced by the government and was not predisposed. When a DEA agent, aware that the defendant wanted to help his mom financially, claimed his friend dealt heroin, the defendant said, "your buddy must be crazy, that stuff will get you locked up." The agent replied his friend was "making a killing," had never been caught, and was supporting his family. Did the district judge err when she denied the motion for acquittal?

II. The denial of a Rule 33 motion is reviewed for abuse of discretion. The district court treated evidence that a government witness had deliberately brought about his interactions with the defendant, said he would get the defendant to "bite" using the "family angle," and pressured the defendant's mother's doctor into claiming that her insurance had lapsed as not material to the entrapment defense. Was dismissing the motion an abuse of discretion?

STATEMENT OF FACTS

Before Archibald Hark met Paul Lopez, he was a janitor at the local church. R. 42–43. He

struggled to find a better job after he was caught dealing marijuana in 2014 and had not dealt drugs since high school. Id. He enrolled in his studies at Guam Tech so he could help support his disabled mom, who could not work. R. 41–42. He met Lopez, a DEA agent with six months of experience who was seeking a promotion and had not been trained on entrapment. R. 24–26.

In early January 2020, Hark mentioned that he used to know every marijuana dealer in the city. R. 13. At the time, Lopez did not know Hark had ever dealt drugs. R. 27. He asked Hark to be his lab partner. R. 14. At the third lab, Lopez asked Hark if he still smoked marijuana and if he could get him some. R. 15. A month later, Lopez "[broached] the subject again," and said he had a friend who dealt heroin and made enough to pay his mom's mortgage. R. 16–17. Lopez had never heard Hark discuss heroin before. R. 25. Hark had never even met a heroin dealer. R. 45. Hark told Lopez his "buddy must be crazy, that stuff will get you locked up for years" and that "if you need money to help out your family, like I do" there were better ways. R. 17. Lopez said his friend had never been caught, was "making a killing," and wanted a partner. R. 17–18. Hark said his mom had broken her leg and her bills were piling up. R. 18. Lopez replied "it was really admirable to want to help your family, even if it required tough choices." Id. The next Thursday, Hark "ran into" Lopez at Langdells. R. 53. Hark said Lopez "pitched me pretty hard," portrayed heroin as a "foolproof plan," "talked about my mom, and even wrote down on a napkin what he thought I could earn." R. 45. Hark told Lopez to leave him alone about selling heroin. Id. Lopez denied that Hark refused to sell, saying "I would remember" if he had, R. 27, and said he reminded Hark of "the difference other drugs can [make] for your family" and "to think about what we'd discussed." R. 18–19. Before the next lab, Ms. Hark's doctor claimed her insurance had lapsed. R. 46. Hark decided that "selling heroin was the only way" to pay her bills. R. 46.

Lopez connected Hark with an informant, Jason Jacobs, R. 19. While Hark set the deal's

time and place, R. 48, Jacobs provided government heroin and a buyer. R. 37–38. Hark was arrested that night. R. 21, 49. Jacobs said Hark did not seem to hesitate during the deal, R. 33. When asked about Hark's experience, Jacobs said "this'd be his first time dealing heroin," R. 29, and that he knew everyone in Guam's heroin business, did not know Hark, and that Hark did not use heroin's street name, "tecata." R. 36.

The jury was excused on July 9. R. 65. Three new witnesses came forward on July 10. R. 78, 81, 83. Sophia Brooks, a classmate, said Lopez examined Hark's mugshot in early January, said on an early-March call "he wasn't biting last time…Maybe I can play up the family angle…I should be able to lock this down," and positioned himself near Hark before labs. R. 76–77. Hark was unaware of this deliberate positioning. R. 44. Merry Boak, a barista, was at Langdells in mid-March. R. 79. She said Lopez scanned Langdells for Hark before entering, spoke of a shared "plan," said dealing heroin was "a smart move… for your family," mentioned a "broken leg several times," and wrote "something on one of our napkins." R. 79–80. She heard Hark tell Lopez to "leave him alone" about drugs. R. 79–80. Boak said Hark did not know she heard the meeting. Id. Rafael Diaz, Ms. Hark's doctor, said Lopez called him, said he was going to put Hark away, told him to tell Ms. Hark her insurance had lapsed, and threatened him with civil and criminal penalties if he did not comply. R. 82–83. The district court found that Hark was diligent and that the affidavits were newly discovered but not material. R. 85. Brooks and Boak did not know their evidence was relevant until July 10. R. 77, 80–81. Hark's attorney interviewed many of his classmates, asked the school to email the rest, but did not have enough time to interview everyone before trial. R. 70. Brooks' email was caught in her spam. R. 77.

SUMMARY OF ARGUMENT

The district court erred when it denied Hark's motion for acquittal on the basis of entrapment. A Rule 29 motion should be granted when, viewing the evidence in the light most

favorable to the government, no rational tier of fact could have found the crime beyond a reasonable doubt. United States v. Jones, 231 F.3d 508, 515–16 (9th Cir. 2000). The Court reviews the motion de novo. Id. Entrapment is established when the government induced the defendant to commit the crime and the defendant lacked predisposition. Id. Lopez's appeals to Hark's non-criminal concern for his mother was sufficient to show inducement. The court erred in finding predisposition. Predisposition is evaluated using five factors: (1) the defendant's character and reputation; (2) whether the government first suggested the crime; (3) whether the defendant was motivated by profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement. United States v. Smith, 802 F. 2d 1119, 1124–25 (9th Cir. 1986). While Hark was motivated by profit, he was not predisposed because: (1) he had never sold and had no reputation for selling heroin; (2) Lopez first suggested selling heroin; (3) Hark demonstrated reluctance to sell; and (4) Lopez's appeals to his care for his mom were sufficient to create disposition in an "unwary" innocent. Thus, the Court should grant Hark's motion.

The district court erred when it denied Hark's Rule 33 motion, which is reviewed under Hinkson's abuse of discretion test. A reviewing court determines (1) whether the district court applied the correct rule, and (2) whether that application was illogical, implausible, or without support in inferences that may be drawn from facts in the record. United States v. Hinkson, 585 F.3d 1247, 1261–62 (9th Cir. 2009). The Harrington test was the correct rule. A defendant must show that: (1) the evidence is newly discovered; (2) the failure to discover it sooner was not due to a lack of diligence by the defendant; (3) it is material to the issues at trial; (4) it is neither cumulative nor merely impeaching; and (5) it indicates that a new trial would probably result in an acquittal. United States v. Harrington, 410 F.3d 598, 601 (9th Cir. 2005). The district court's application of Harrington was illogical. The affidavits were newly discovered because they

contain new information made accessible after trial. Hark was diligent because he did not know this evidence existed and used reasonable means to seek it. The evidence was material and would probably result in acquittal; it shows that Lopez's appeals to Hark were inducement, met with heavy reluctance, and succeeded only when he coerced Ms. Hark's doctor into lying about her insurance. R. 82. Because the evidence makes new claims of fact material to entrapment, it is not merely impeaching or cumulative. Thus, the Court should grant Hark's motion for a new trial.

ARGUMENT

I. The undisputed evidence shows the Government failed to meet its burden of proving beyond a reasonable doubt that the defendant was not entrapped.

The government must prove beyond a reasonable doubt that the defendant was not entrapped. Jones, 231 F.3d at 515–16. The standard of review for a Rule 29 motion is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. The reviewing court reviews this question de novo. Id. This is not simply a rubber-stamp process affirming the trial court's findings, but an independent review. Courts have a duty to intervene to protect otherwise law-abiding citizens from government efforts to entrap them. Jacobson v. United States, 503 U.S. 540, 553 (1992). This Court recognizes a distinction between an "unwary innocent" and an "unwary criminal." Jones, 231 F.3d at 516. A defendant is an unwary innocent with a credible entrapment defense if (1) the government induced the defendant to commit the crime and (2) the defendant lacked predisposition. Id. As an unwary innocent, Hark had every right to protection from an overzealous novice agent advancing his own career. R. 26.

This Court should reverse the district court's denial of the Rule 29 motion. If the Court reverses, the Rule 33 motion will no longer be needed. To win acquittal, Hark must point to "undisputed evidence […] that an otherwise innocent person was induced to commit the illegal act by government agents." Smith, 802 F. 2d at 1124. Inducement is "any government conduct

creating a substantial risk that an otherwise law-abiding citizen would commit an offense" and includes persuasion, fraud, and coercive tactics. United States v. Cortes, 757 F.3d 850, 858 (9th Cir. 2014). Predisposition is evaluated using five factors: "(1) the character and reputation of the defendant; (2) whether the government made the initial suggestion of criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement." Smith, 802 F.2d at 1124–25. Not all factors are required, and reluctance is the most important. Id. While the Appellant concedes that Hark was partly motivated by profit, this is not dispositive. See United States v. Skarie, 971 F.2d 317, 321 (9th Cir. 1992) (holding that while the profit motive factor favored the government, the defendant was still entrapped).

i. There was insufficient evidence for a jury to find that Hark was not induced by Lopez.

The pecuniary reward for committing a crime is not sufficient, by itself, to establish inducement; inducement requires an "opportunity" plus "something else." United States v. Spentz, 653 F.3d 815, 819 (9th Cir. 2011). In Spentz, the court held the defendants were not entrapped, as their sole motive for joining the government's plan to commit robbery was money, and the "something else" prong requires "excessive pressure by the government" or "taking advantage of an alternative, noncriminal" motive. Id. The Spentz defendants' desire to make money was the prototypical motive for robbery, not an alternative, non-criminal one. Id. Similarly, in United States v. Garza-Juarez, the court held that the defendant was not entrapped because it was uncontested that he was purely motivated by money: he was already selling guns for profit before the government agent made contact, and the agent offered no particular inducement other than the price of the guns. 992 F.2d 896, 909 (9th Cir. 1993). Although the Spentz and Garza-Juarez courts suggested that the monetary rewards from crime could not serve

as the sole motive for inducement, they did not suggest that noncriminal motives like paying for family medical bills could not be valid inducement. When evaluating inducement, the jury may consider all of the circumstances shedding light on how the government persuaded or pressured the defendant. Cortes, 757 F.3d at 816.

The Poehlman court found entrapment because the government induced the defendant by playing on his "obvious need for an adult relationship, for acceptance of his sexual proclivities and for a family.'' United States v. Poehlman, 217 F.3d 692 at 702 (9th Cir. 2000). After losing his marriage and job because of his cross-dressing, the defendant's need for acceptance was clear. Id. at 695. The agent's repeated efforts to induce the defendant to attempt lewd acts with a minor succeeded only after she "used friendship, sympathy and psychological pressure to beguile him into committing crimes which he otherwise would not have attempted." Id. at 698.

In Garza-Juarez, and Spentz, the defendants were motivated only by profit. Garza-Juarez, 992 F.2d at 909; see Spentz, 653 F.3d at 819. Hark was not motivated purely by profit. Just as the Poehlman defendant had a noncriminal motive for acceptance after being rejected by his wife and employer, 217 F.3d at 695, Hark had a noncriminal desire to support his mom; he enrolled at Guam Tech to support her, R. 41, and dealt heroin only when he thought he had no other way to pay her medical bills, R. 46. Hark's non-criminal desire to support his mother was a vulnerability the government exploited, satisfying the "something else" prong.

Inducement can be implicit. See Poehlman, 217 F.3d at 701 (reasoning that even very subtle governmental pressure, if skillfully applied, can amount to inducement). In Poehlman, while the government argued that its agent "did not induce [the defendant] because [she] did not, in so many words, suggest he have sex with her daughters," the court reasoned this view was too narrow and the sexual innuendos in her messages clearly implied that this was "precisely what

she had in mind." 217 F.3d at 699. While Appellee may argue that Lopez did not ask Hark "in so many words" to deal heroin, Lopez's statements clearly implied this was what he had in mind. In light of his knowledge that Hark wanted to help his mom financially, R. 17, Lopez's claims that his friend dealt heroin, had never been caught, and made enough to pay his mom's mortgage were clearly a suggestion to deal heroin. R. 16–17. That Lopez continued to approach Hark after learning about his mother's broken leg, R. 18, by presenting a "foolproof plan" and writing on a napkin what he thought Hark could earn, R. 45, made his meaning even clearer.

ii. The prosecution failed to prove beyond a reasonable doubt that the defendant was independently predisposed to dealing heroin.

(a) Hark's character and reputation did not show the predisposition to sell heroin.

The government must establish that a defendant was independently predisposed to commit the specific crime charged, Jacobson, 503 U.S. at 542, before being approached by its agents, Id. at 549; it is not enough to argue that a defendant was predisposed to break the law generally. Id. at 542. Evidence of character, or of prior bad acts, becomes relevant to assessing predisposition when the entrapment defense is raised. United States v. Mendoza-Prado, 314 F.3d 1099 (9th Cir. 2002). However, any evidence of prior bad acts is irrelevant unless the prior acts are similar to the charged crime, such that "a rational inference can be drawn from the prior act that one induced to perform [the charged crime] was predisposed to do so." Mendoza-Prado, 314 F.3d at 1099 (citing United States v. Bramble, 641 F.2d 681, 682 (9th Cir.1981)) (explaining that a prior conviction for marijuana possession did not show predisposition to sell cocaine).

The Jacobson court found that the defendant was predisposed to break the law but not to commit the charged crime before being approached by the government. 503 U.S. at 549. In Jacobson, the prosecution failed to prove the defendant was predisposed, independent of the government's acts, to break the law by receiving child pornography. Id. At most, the Jacobson defendant had a predisposition that was "at most indicative of certain personal inclinations,

including a predisposition to view photographs of preteen sex," which did not establish his predisposition to commit the crime of receiving child pornography through the mail. Id.

Familiarity with the charged crime can evince predisposition. See Mendoza-Prado, 314 F.3d at 1099 (holding defendant was not entrapped and reasoning that defendant's familiarity with cocaine evinced predisposition). The defendant's familiarity with cocaine was demonstrated by his knowledge of its price and production process. Id. Predisposition to deal one drug does not automatically transfer to another. See United States v. Sanchez, 379 Fed. Appx. 551, 553 (9th Cir. 2010) (holding past convictions for cocaine possession in 1985 and 1989 did not evince predisposition to sell methamphetamine). Past convictions may be too old to show predisposition. See Sherman v. United States, 356 U.S. 369, 375 (1958) (holding that neither a nine-year old dealing conviction nor a five-year old possession conviction evinced predisposition to deal narcotics). See also Skarie, 971 F.2d at 320 (holding that selling unknown quantities of drugs to an unknown party at an undefined point in the past did not evince predisposition).

Hark's character and reputation did not show predisposition to deal heroin. While one could argue that Hark was predisposed to break the law, like the Sanchez defendant, 379 Fed. Appx. at 553, his past dealing one drug (marijuana), R. 42, did not show predisposition to deal another (heroin). The Jacobson defendant's disposition to break the law did not predispose him to commit the charged crime. 503 U.S. at 542. Similarly, Hark's high school past with marijuana did not predispose him to be a heroin dealer, nor did it give Lopez the license to make him one. R. 42. Hark never considered dealing heroin before his interactions with Lopez. R. 45. Since his brush with the law Hark had stopped dealing drugs, faced justice, and become a law-abiding citizen; when Lopez met him, Hark was taking classes to better support his mother. R. 42.

Unlike the Mendoza-Prado defendant, who was familiar with the cocaine market, 314

F.3d at 1099, Hark had no familiarity with, and no reputation for dealing heroin. Hark did not use heroin's street name, tecata, which suggests his lack of familiarity, and the informant, Jason Jacobs, stated that he knew everyone in Guam's heroin business and had never heard of Hark. R. 36. When asked about Hark's experience, Jacobs said "this'd be his first time dealing heroin." Id. Indeed, Lopez's claim that he was unaware of Hark's past conviction, R. 27, suggests he was trying to induce someone he thought was an unwary innocent. Given the entrapment defense aims to protect unwary innocents from overzealous agents, especially those not trained in entrapment, R. 26, Lopez's actions clearly warrant heavy scrutiny.

Even if Lopez knew about Hark's past, prior acts do not show predisposition unless they were for a similar crime. Mendoza-Prado, 314 F.3d at 1099. The trial court erred by equating Hark's history with marijuana with the predisposition to engage in the serious crime of dealing heroin. If dealing one hard drug (cocaine) did not evince predisposition to deal another hard drug (methamphetamine) in Sanchez, 379 Fed. Appx. at 553, it is irrational to find predisposition to deal heroin merely from a past sale of marijuana, which has been legalized in Guam.

A prior drug conviction alone does not establish predisposition. Sherman, 356 U.S. at 375. Where the Sherman defendant had a nine-year old conviction for narcotics sales and a five-year old conviction for possession, id., Hark had a six year old conviction for selling marijuana. R. 42. Just as the Sherman defendant's prior convictions did not prove predisposition, Hark's prior conviction does not evince predisposition because it is too old to be probative.

(b) It is uncontested that Lopez made the initial suggestion of dealing heroin.

It is undisputed that the initial suggestion to deal heroin came from Lopez. R. 15–17. Both Lopez and Hark testified that Lopez was the first to raise the topic. R. 25. That Hark spoke about marijuana before being approached is irrelevant, R. 13; merely discussing illegal activities does not constitute an initial suggestion. See Garza-Juarez, 992 F.2d at 908 (reasoning that while

defendant mentioned illegal activities first, the government made the initial suggestion when it asked the defendant to supply illegal weapons). Lopez's testimony showed that he had never heard Hark discuss heroin and that Lopez had raised the topic of drugs in every interaction: first when he asked Hark if he still smoked marijuana and could get him some, again when he said his friend dealt heroin, and when he said his friend was seeking a partner. R. 15–18.

(c) Hark demonstrated reluctance to sell heroin, rejecting Lopez's persistent persuasion, until Hark's dire financial constraints provided him with no other option.

The defendant's reluctance is the most important factor. Smith, 802 F.2d at 1125. In Skarie, the court held the government entrapped the defendant by repeatedly pressuring her to sell drugs. 971 F.2d at 321. The defendant refused to deal despite "repeated requests [relenting] only after government's agent" threatened "her and her family." Id. In Mendoza-Prado, the court held the defendant was not entrapped because he showed no reluctance and "with very little inducement, readily agreed to look for the cocaine." 314 F.3d at 1099.

While Hark did not hesitate when he sold heroin after speaking to Jacobs, R. 43, this fact is not relevant because the defendant must be predisposed before first contact by government. See Mendoza-Prado, 314 F.3d at 1103. Like the Skarie defendant, who was persuaded to sell drugs by repeated efforts which only succeeded after threats to her family, 971 F.2d at 321, Hark was persuaded to sell heroin by repeated efforts which only succeeded after he believed it "was the only way" he could pay his mom's medical bills. R. 46. That Hark only dealt heroin out of desperation shows his great reluctance. Unlike the Mendoza-Prado defendant who discussed cocaine deals repeatedly without expressing reluctance, 314 F.3d at 1099, Hark repeatedly stated his negative views about dealing heroin. R. 17. When Lopez mentioned heroin, Hark rebuffed him, saying that dealing heroin was crazy and there were better ways to help one's family. Id.

(d) Lopez's persuasion and trickery demonstrated that the nature of the inducement was sufficient to induce an unwary innocent.

Establishing entrapment requires undisputed evidence that an unwary innocent was induced by conduct such as the trickery or persuasion of a government agent. United States v. Williams, 547 F.3d 1187, 1198 (9th Cir. 2008). This is a subjective inquiry into whether "the government's deception actually implants the criminal design in the mind of the defendant." Id.

Lopez's trickery and persuasion were sufficient to induce an unwary innocent. Lopez's testimony showed that he repeatedly played on Hark's desire to help his mom. R. 17. Lopez claimed that he had a friend who dealt heroin and made enough to pay for his mom's mortgage. R. 17. Lopez knew Hark wanted to help his mom, telling him "it was really admirable to want to help your family, even if it required tough choices," after Hark revealed that his mom had broken her leg and that her bills were piling up. R. 18. Lopez presented Hark with a "foolproof plan," R. 45, even stating that his friend has never been caught. R. 17. This was persuasion and trickery, as Lopez lied about his "friend" and knew the plan was not foolproof given he had every intent to arrest Hark. After implanting the initial criminal design by aggressive appeals to Hark's core concern for his mom, Lopez had Jacobs supply Hark with the heroin and buyer needed to execute the deal. R. 37. While Hark suggested the time and place of the deal, R. 48, this was a very minor contribution compared to Lopez's role in supplying government-issued heroin, R. 37.

Lopez's lack of training on entrapment, R. 26, also suggests his conduct was too aggressive. See United States v. Martinez, 122 F.3d 1161, 1165 (9th Cir. 1997) (affirming acquittal based on entrapment and noting that the agent's lack of knowledge about entrapment strongly supported the inference he had been inappropriately aggressive in inducing defendant).

II. Denying Hark's motion for a new trial was an abuse of discretion.

The district court's denial of the Rule 33 motion was an abuse of discretion under Hinkson. 585 F.3d at 1261-62. The reviewing court determines (1) whether the district court

applied the correct legal rule, and (2) whether that application was illogical, implausible, or without support in inferences that may be drawn from facts in the record. Id. The district court correctly identified Harrington as the rule. Under Harrington, a defendant must establish that: (1) the evidence is newly discovered; (2) the failure to discover the evidence sooner was not due to a lack of diligence by the defendant; (3) the evidence is material to the issues at trial; (4) the evidence is neither cumulative nor merely impeaching; and (5) the evidence indicates that a new trial would probably result in an acquittal. Harrington, 410 F.3d at 601. The district court's denial of the motion was an abuse of discretion under the second prong of Hinkson. Because the Hinkson test is applied to each factor individually, see Hinkson, 585 F.3d at 1264 (applying the test to each factor in turn), and because the district court found the first two factors were satisfied, R. 85, our burden is to show abuse of discretion on at most three factors. We address the third and fifth factors together because they overlap. See United States v. Krasny, 607 F.2d 840, 845 n.3 (9th Cir. 1979) (noting that materiality and probability measure the same thing).

i. The affidavits were newly discovered evidence.

Evidence is newly discovered when it is discovered after a jury has given its verdict and been excused. United States v. McKinney, 952 F.2d 333, 335 (9th Cir. 1991). In United States v. Mendez, the court found conversation records were newly discovered even though the defendant took part in those conversations, as he was unaware of the records and lacked access to them before trial. 619 Fed. Appx. 644, 645–46 (9th Cir. 2015). Such evidence must contain new information. Hinkson, 585 F.3d at 1264-65. In Hinkson, evidence a form signature was fake was not newly discovered because the defendant had offered other evidence the form was fake. Id. Evidence is "newly available" and not newly discovered when a defendant who refused to testify later offers evidence clearing a codefendant. See United States v. Lockett, 919 F.2d 585, 591 (9th Cir. 1990). Given the deferential Hinkson standard and the new information in the affidavits, this

Court should uphold the district court's finding that they were newly discovered. R. 85.

The affidavits are clearly newly discovered. The jury was excused on July 9. R. 65. The affidavits were provided after trial on July 10, satisfying McKinney. R. 78, 81, 83. The affidavits also contain new information. While evidence that a signature was fake was subsumed by evidence the entire form was fake in Hinkson, 585 F.3d at 1262, Brooks' factual claims that Lopez examined Hark's mugshot and spoke with the DEA about getting Hark to bite were not heard at trial. R. 76–77. Similarly, Boak's claims that Lopez scanned the premises of Langdells for Hark and spoke of a shared "plan" are new. R. 79–80. While Hark was a party to the Langdells meeting, just as the Mendez defendant did not know his evidence existed, 619 Fed. Appx. at 646, Hark did not know Boak's account existed, as he did not know she was listening. R. 80. Diaz's claims that Lopez threatened him into claiming Ms. Hark's insurance had lapsed, R. 82–83, are certainly new information not considered at trial.

Appellee may cite Lockett to argue the affidavits should be treated as "newly available", not newly discovered, evidence from witnesses who refused to testify earlier. 919 F.2d at 591. However, Lockett applied to defendants, not witnesses, id., and the witnesses did not actually refuse to testify. Both Brooks and Boak never considered testifying because they did not know their evidence was relevant until July 10. R. 77, 80–81. While Diaz may have known his evidence was relevant, his silence was hardly a choice. Forcing a witness not to testify can render their testimony newly discovered. See United States v. Reyes-Alvarado, 963 F.2d 1184, 1188 (9th Cir. 1992) (explaining defendants' evidence was not new because they did not show they were forced not to testify). Given Lopez's coercion, this Court must treat this evidence as newly discovered to serve the interests of justice. R. 83.

Nor can Appellee claim the affidavits were not newly discovered because Hark's lawyer

decided not to call the witnesses. See United States v. Joelson, 7 F.3d 174, 179 (9th Cir. 1993) (explaining that witness's evidence was not newly discovered because the lawyer spoke to her before trial and decided not to call her). Unlike the Joelson lawyer, id., Hark's lawyer had no conversations with the witnesses, could not reasonably have suspected their evidence existed (as discussed in the next section), and cannot be said to have decided against using their evidence.

ii. The failure to discover the affidavits sooner was not due to a lack of diligence.

Defendants are not diligent when they fail to use reasonably available means to obtain evidence they knew or suspected existed before or during trial. See United States v. Brugnara, 856 F.3d 1198, 1206 (9th Cir. 2017). The Brugnara court held the defendant was not diligent because he believed the art at issue was worthless, was advised to use a court procedure to obtain a valuation, and did nothing until after his conviction. Id. Diligence does not impose an extraordinary burden. See Hinkson, 585 F.3d at 1285 (Fletcher, J., dissenting) ("All that is required is ordinary diligence, not the highest degree of diligence"). See also Mendez, 619 Fed. Appx. at 646 (explaining that defendant's failure to obtain records of his past conversation was not un-diligent because he did not know they existed and his attorney had taken significant steps to investigate his past). Given the deferential Hinkson standard and Hark's reasonable efforts to seek evidence, the Court should uphold the district court's finding that Hark was diligent. R. 85.

Brooks' affidavit satisfies the diligence requirement. While the defendant in Brugnara suspected the artwork was incorrectly valued, 856 F.3d at 1206, Hark had no suspicion Brooks' evidence existed. His testimony that Lopez always seemed to sit near him, R. 44, showed he was unaware of Lopez's deliberate targeting, R. 77. While Appellee may argue that because most of Hark and Lopez's conversations took place in class, Hark should have made extensive efforts to reach his classmates, diligence requires only the use of reasonably available means, see Brugnara, 856 F.3d at 1206, to obtain evidence. Hark's attorney interviewed several of Hark's

classmates and asked the school to email the rest. R. 77. While this email went to Brooks' spam, Hark's attorney could not have foreseen what her filters would do, id., and could not reasonably have interviewed every classmate, as there was not enough time before trial. R. 70.

Boak's affidavit satisfies the diligence requirement. Hark's testimony that he "ran into" Lopez at Langdells, R. 53, shows he did not suspect the facts alleged by Boak (that Lopez scanned the premises for him) existed. R. 79. Appellee may argue that the importance and public setting of the conversation should have led Hark to seek witnesses from Langdells. However, Hark had no reason to know that anyone overheard the conversation, and Boak said that Hark did not realize she could hear them. R. 80. Even if there were other customers, Hark had no readily available means of identifying who sat near him during the meeting. Just as the Mendez defendant's memory of past conversations did not obligate him to seek records he did not know existed, 619 Fed. Appx. at 646, Hark did not have to reach witnesses he did not know existed.

Diaz's affidavit was not available to a party exercising diligence. Hark had no awareness that Lopez had forced Diaz to falsely claim that Ms. Hark's insurance had lapsed. R. 83. It would be unreasonable to fault Hark for not expecting Lopez to coerce Ms. Hark's doctor. The behaviors described by Diaz are simply outside the boundaries of the behavior expected of a DEA agent, and could not have been anticipated. Appellee may argue that the time it took Hark to secure the affidavits after he was arrested weighs against him. R. 49. However, diligence is required when defendants are seeking evidence they knew or suspected existed before or at trial, Brugnara, 856 F.3d at 1206, and, as discussed above, Hark did not know this evidence existed.

iii. The affidavits were material and indicate a new trial would probably result in acquittal.

As this Court has held in related contexts, the affidavits' materiality should be considered collectively, not individually. See Hooper v. Shinn, 985 F.3d 594, 55 (9th Cir. 2021) (explaining that materiality of withheld evidence must be assessed in terms of its collective effect).

(a) The affidavits would lead a new jury to find inducement.

Inducement is any government conduct, including persuasion and coercion, creating a substantial risk that an otherwise law-abiding citizen would commit the offense. Cortes, 757 F.3d at 858. Inducement typically involves excessive pressure or taking advantage of an alternative, non-criminal motive. Id. The affidavits demonstrate that Lopez created this substantial risk by explicitly appealing to Ms. Hark's medical situation and by coercing Ms. Hark's doctor. In addition to taking advantage of Hark's non-criminal motive to care for his mother, see supra Section I.i, Lopez's coercion of Dr. Diaz certainly created excessive pressure.

While Lopez portrayed the Langdells meeting, the last before Hark agreed to deal, R. 19, as a chance, brief encounter where he only vaguely referred to "the difference other drugs can [make] for your family," R. 18–19, Boak shows how explicit Lopez's final appeal was. Lopez's statement that dealing heroin was "a smart move…for your family" and his references to a broken leg were explicit appeals to Hark's desire to help his mother. R. 80. Hark's uncontested testimony that he attended Guam Tech to support his disabled mother, R. 41, and that he only dealt heroin to pay her medical bills, R. 46, shows his core motive was to care for her. Lopez's appeals to this non-criminal motive created the substantial risk needed for inducement.

Most damning of all, Dr. Diaz's affidavit shows Lopez used coercion, threatening Diaz with civil and criminal penalties, to implant Hark's belief that his mother's insurance had lapsed, R. 82, driving Hark to sell heroin, R. 46. In addition to creating substantial risk by playing on Hark's core concern for his mother, this act was excessive pressure; causing a defendant to believe their loved ones will lose access to vital medical care unless they can come up with large sums of money certainly crossed the bounds of acceptable government behavior.

(b) The affidavits would lead a new jury to find Hark was not predisposed.

Reluctance is the most important factor for assessing predisposition. Smith, 802 F.2d at

1125. The government may not implant disposition, Jacobson, 503 U.S. at 548, and must prove beyond a reasonable doubt that the defendant was disposed before government contact, Id. at 557. All of the evidence at trial came from Hark's testimony or that of two government witnesses. The affidavits supply third-party testimony showing that Hark's great reluctance, even after Lopez's efforts to persuade him, was overcome only by Lopez's coercion of Diaz.

Boak's affidavit demonstrates Hark's great reluctance in the face of Lopez's strenuous efforts. Hark testified that Lopez "pitched me pretty hard," "talked about my mom, and even wrote down on a napkin what he thought I could earn." R. 45. Boak's evidence that Lopez mentioned a "broken leg several times" and wrote "something on one of our napkins" matches the specifics of Hark's testimony, R. 80. Boak also corroborates Hark's testimony, R. 46, that he refused to deal heroin and told Lopez to "leave him alone," R. 80, contradicting Lopez's testimony that Hark made no such refusal, R. 27. As a third-party witness, Boak would probably lead a jury to disbelieve Lopez and find that even his forceful appeals did not sway Hark.

Crucially, this was the last meeting before Hark heard his mom's insurance had lapsed, which led him to sell heroin. R. 46. Given Diaz's statement that he was coerced into relaying this information, R. 82 a jury would probably find that Hark only agreed to sell heroin under conditions Lopez created. The fact that Lopez engaged in such coercive, dubiously legal conduct suggests he recognized he had failed to overcome Hark's resistance through other means.

The affidavits also resolve the argument over when Hark's predisposition should be assessed in favor of the Appellant. Appellee may argue predisposition must be established before the government acts *intending* to create disposition. Jacobson, 503 U.S. at 548. Thus, Appellee may argue that Hark's predisposition should be assessed at the time of the drug sale by claiming that Lopez never acted with the intent to create disposition. However, Brooks' affidavit shows

that Lopez was acting with such intent by early March, when he told a contact "I should be able to lock this down." R. 77. Because this predates the mid-March Langdells meeting, R. 79, a jury could conclude that Hark was not predisposed even *after* Lopez acted to create predisposition. Furthermore, Brooks' evidence that Lopez had a mugshot of Hark in early January, R. 76, strongly suggests that Lopez's efforts to create predisposition began at the start of the semester.

Because the affidavits refute Lopez's uncorroborated testimony, they make it substantially more likely that a jury would find that Hark was not predisposed. Lopez's testimony that he had no idea Hark had a past conviction, R. 27, is contradicted by Brooks' evidence that he had Hark's mugshot in early January, R. 76, just as Lopez's insistence that Hark never refused to deal heroin and that "I would remember" if he had, R. 27, is contradicted by Boak's evidence that Hark clearly refused to deal heroin at Langdells, R. 80. Confronted with such clear contradictions between the testimony of a government agent who had never been trained in entrapment, R. 26, and that of third-party witnesses, a jury would likely disbelieve Lopez's hardly disinterested testimony. Furthermore, Lopez's potentially criminal efforts to coerce Diaz, R. 83, could lead a jury to deem Lopez's testimony totally incredible. See United States v. Davis, 960 F.2d 820, 825 (9th Cir. 1992) (explaining that new evidence that a defendant was convicted solely by the uncorroborated testimony of a crooked cop who stole drug money would lead the "interests of justice" to support a new trial under Rule 33). Because the affidavits collectively refute Lopez's uncorroborated testimony and show that Hark refused to deal heroin until Lopez implanted the key belief that led him to agree, it was illogical and an abuse of discretion to find that they were not material and would not have led to acquittal.

iv. The affidavits are neither cumulative nor merely impeaching.

Evidence is cumulative when it merely supports a fact established by existing evidence. See Liao v. Junious, 817 F.3d 678, 695 (9th Cir. 2016). Evidence is "more than merely

cumulative or impeaching" when it is material – i.e, it "probably would produce an acquittal." See United States v. Schaflander, 719 F.2d 1024, 1027 (9th Cir. 1983).

The affidavits are neither cumulative nor merely impeaching because they present new evidence not considered at trial. Brooks' claims concerning Lopez's mugshot of Hark, call with the DEA, and repositioning before labs are all new claims of fact. R. 76–77. While Appellee may argue that Boak's affidavit is merely cumulative, as it describes an encounter discussed at trial, Boak makes the new factual claim that Lopez scanned Langdells for Hark before entering. R. 79. There is no question Diaz's description of Lopez's coercive tactics presents new evidence. R. 82.

The affidavits are also neither cumulative nor merely impeaching because they are material to entrapment. Brooks' claims that Lopez acted intending to create disposition in early March, R. 77, if not early January, R. 79, is material to predisposition, see supra Section II.iii.b. Boak's claims that Lopez explicitly appealed to Hark's concern for his mother, R. 80, and that Hark refused to deal heroin, id., is material to both inducement and predisposition, see supra Section II.iii. Diaz's claims that Lopez coercively created Hark's belief that his mom's insurance had lapsed, R. 82, also goes to the heart of inducement and predisposition, see supra Section II.iii. Thus, it would be illogical to find the affidavits were cumulative or merely impeaching.

CONCLUSION

For these reasons, the petitioner respectfully requests that the Court reverse the judgment and grant the Rule 29 motion for acquittal on the basis of entrapment or, alternatively, the Rule 33 motion for new trial on the basis of newly discovered evidence.

Dated this 29 day of March, 2021

Respectfully submitted,
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ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC.

PETITIONER,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,

RESPONDENTS.

Docket No. 21-869

Argued: Wednesday, October 12, 2022

BENCH MEMORANDUM

Question Presented

Whether Andy Warhol's 2016 commercial licensing of the "Orange Prince" silkscreen image was a "transformative" use when it can reasonably be perceived to convey a different meaning or message from Lynn Goldsmith's original copyrighted photograph of Prince.

Introduction

Whether a work is fair use is determined by weighing four factors on a case-by-case basis:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for, or value of the copyrighted work.

17 U.S.C. § 107. Petitioner contends that the Second Circuit's test for

transformativeness—a component of the first factor in assessing fair use—conflicts with the decisions in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), and *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021). Petitioner does not challenge the Second Circuit's holding with respect to the remaining three fair use factors.

This case involves the question of whether the overlay of Warhol's distinctive silkscreen style onto the Goldsmith photograph of Prince was transformative. Petitioner argues that the answer is "yes" — follow-on work that adds new meaning or message to the original source material is transformative and weighs in favor of fair use. Respondent says "no," at least when a related follow-on work merely supersedes the original and does not have a new purpose or character. The Government's amicus curiae brief supports the Respondent, arguing that absent a justification for using the original source material, the first factor must be weighed against a finding of fair use. The Respondent and Government have the stronger arguments, which supports affirming the judgment of the Second Circuit.

Factual Background

In 1981, Respondent Lynn Goldsmith photographed Prince in her studio for a Newsweek assignment, aiming to portray Prince as a "vulnerable human being." Pet.App.71a. Goldsmith shot portraits of Prince after choosing the white backdrop, arranging the lighting to feature his "chiseled bone structure," accentuating his features with makeup, and alternating between camera lenses to frame his face shape. However, Newsweek ultimately chose one of Goldsmith's concert

photographs of Prince. Goldsmith retained copyrights of the black-and-white portraits of Prince for future publication or licensing. One of the portraits from the studio session—a never-before-seen black-and-white portrait of Prince, "Goldsmith's photograph of Prince"—is at issue in this case.

Three years later, Vanity Fair paid a licensing fee for Goldsmith's photograph of Prince to be used as an "artist reference" for an illustration to be published in the magazine. Vanity Fair agreed to credit Goldsmith as the source in exchange for a license to use the single illustration for its magazine. The license stated: "NO OTHER USAGE RIGHTS GRANTED." J.A. 85. Vanity Fair then commissioned Andy Warhol, a pioneer of the twentieth century Pop Art movement, to create 16 silkscreens and sketches based on Goldsmith's photograph of Prince, known as the Prince Series. Vanity Fair subsequently published one illustration from the Prince Series, in which Prince's face is colored purple against a coral background, in a November 1984 article titled "Purple Fame".

Following the death of Andy Warhol in 1987, Petitioner Andy Warhol Foundation for the Visual Arts, Inc. ("AWF") assumed ownership of the Prince Series. In 2016, Condé Nast licensed an illustration from the Prince Series ("Orange Prince") from AWF, who claimed copyright ownership of the Prince Series. Neither AWF nor Condé Nast credited or paid Goldsmith. After Goldsmith alerted AWF of potential copyright infringement, AWF sued for declaratory judgment of non-infringement or fair use.

At trial, the District Court found that the Prince Series portrayed Prince as

"an iconic, larger-than-life figure" and concluded that the Prince Series conveyed a different message from Goldsmith's photograph of Prince. Pet.App.72a. The District Court granted AWF summary judgment, but the Second Circuit reversed, holding that Warhol's use of Goldsmith's photograph of Prince was not fair use because it was non-transformative. The Second Circuit explained that "Orange Prince" (1) retained essential elements of the Goldsmith photograph of Prince and (2) served an identical overarching purpose. The Second Circuit rejected the notion that adding new meaning or message to an original source material is dispositive for finding transformative-ness under the first factor.

Contentions of the Parties

According to Petitioner's meaning-or-message test, new work is transformative if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message." *Campbell*, 510 U.S. at 579. This understanding of "transformative" use, Petitioner argues, comports with the holdings of *Campbell* and *Google*. In *Campbell*, the Court performed a "case-by-case analysis" to assess when a follow-on work has a new "purpose and character" from the original. *Id*. at 577. Despite incorporating Roy Orbison's signature elements, the Court held that 2 Live Crew's commercial parody of Orbison's song "'Oh, Pretty Woman'" made "transformative" use of original by commenting on and ridiculing the original. *Id*. at 583. In *Google*, the Court found Google's verbatim use of Oracle's Sun Java programming code to be transformative, because the code was used for a distinct purpose from the original — "to create new

products" and "a new platform." *Google*, 141 S. Ct. at 1203. Petitioner's central claim is that both *Campbell* and *Google* held that a work is transformative if it conveys a different meaning or message from the original source material. Likewise, because "Orange Prince" portrays Prince as "iconic" and dehumanizes him to comment on American celebrity culture, while Goldsmith's photograph portrays Prince as "vulnerable," "Orange Prince" carries a new meaning and is transformative.

Respondent counters that, under this Court's precedent, a follow-on work cannot be transformative unless (1) the copying is "necessary" to accomplishing some "distinct end" and (2) the new use is not a market substitute for the original. Respondent concedes that "indispensability" is not the standard for its test. In support of this necessity test, Respondent argues that Petitioner's reliance on *Campbell* and *Google* to reach a contrary conclusion is misguided. Respondent argues that Petitioner misunderstands *Campbell*'s purpose-focused test. In *Campbell*, Petitioner argues that 2 Live Crew transformed "Pretty Women" by turning it into a parody. Similarly, in *Google*, Google repurposed Oracle's code for developing smartphones. In contrast, "Orange Prince" did not repurpose Goldsmith's photograph of Prince; both are works of art that depict Prince. Respondent further argues that because "Orange Prince" acts as a substitute for Goldsmith's photograph of Prince in the same magazine market, it is an unfair use.

Petitioner argues that Respondent's necessity test (1) is inconsistent with precedent by requiring that copying be "necessary," (2) conflates the first and fourth

factors of the fair use analysis by considering whether the new work will displace the market of the original, and (3) would "devastate artistic expression" by chilling artistic speech.

The Government reaches the same conclusion as the Respondent but does not fully embrace the Respondent's "necessity" test. The Government argues instead that the transformativeness inquiry requires a fair use justification when a related follow-on work borrows from the original source material. The Government further argues that AWF failed to provide *any* justification for copying Goldsmith's photograph of Prince and that the first factor should weigh in favor of Goldsmith. Petitioner rejects the Government's alternative approach and conclusion, claiming that Warhol's Prince Series is not any less transformative by the mere fact that Warhol commented on celebrity culture— rather than on Goldsmith's photograph of Prince.

The first fair use factor should not be "be treated in isolation." *Campbell*, 510 U.S. at 578. Both the Respondent and Government argue that Petitioner isolates the first fair use factor as dispositive while copyright law directs courts to evaluate fair use claims by making a holistic inquiry and balancing all four factors. Additionally, Respondent and the Government repudiate the "bright-line" approach to fair use that Petitioner proposes by arguing that the transformative-ness inquiry does not necessarily focus on what a follow-on work *means*. For example, in *Sony Corp. of America v. Universal City Studios, Inc.*, where Sony Betamax recorded copyrighted television programs for home viewing, the Court found home-use

copying did not substitute for original broadcasts in the market, even though Sony did not add any new meaning to the television programs. 464 U.S. 417, 448-49 (1984).

Key Questions for Resolving the Case

At issue is which of the three transformativeness tests should this Court follow in clarifying the standard for the first fair use factor, "the purpose and character of the use." Although the Government's approach has the most merit, the critical questions that will drive whether to adopt the Government's test include: (a) does the Government's approach accord with the holdings of *Campbell* and *Google*, which advances a purpose-focused test to assess whether the follow-on work is transformative; (b) what must a follow-on author show in order to establish an adequate fair use justification for borrowing the creative elements of the original source material; (c) should copying be permissible when it is essential, necessary, or highly useful and how should the Court define each respective term; and (d) why is the justification element not required when the new meaning-or-message of the follow-on work is unrelated to the original source material.

Specific questions to ask the parties also include: How is your position consistent with fair use precedent? How should the line be drawn between inspiration and appropriation? To what degree should a new meaning or message be relevant in determining the follow-on work's purpose and character? How should the Court ascertain the intent behind or meaning of the original and follow-on work? How much change, if at all, is needed for a follow-on work to be

transformative?

Petitioner advances a "bright-line" approach to treating new meaning or message as dispositive to a finding of fair use. The Respondent offers an objective approach that considers whether the follow-on work (1) involves "necessary" copying of the original source to accomplish some distinct end and (2) does not compete as a substitute for the original in the market. In contrast, the Government argues that a related follow-on work must have a fair use justification for borrowing from the original source material. Despite deviating from the Respondent's necessity test, the Government retains the quintessential elements of Respondent's arguments. Both the Government and Respondent argue that the transformative inquiry examines *why* a follow-on work had to copy the original source material. Petitioner's subjective per se rule, the Government and Respondent contend, fails to consider the "why" and therefore should be rejected. Although Petitioner asserts that Warhol intended for the Prince Series to comment on American celebrity culture, Petitioner fails to explain why retaining the essential elements of Goldsmith's photograph of Prince into "Orange Prince" was necessary for Warhol to express his own artistic intent.

The Government and Respondent offer closely related arguments, but the Respondent's proposed necessity test is unmoored from precedent. Although *Campbell* and *Google* repurposed the original source material in a transformative nature, neither case espoused a necessity element. The necessity test does not account for the possibility that follow-on work can be transformative without

commenting on the original source material. For example, Warhol's Soup Cans still qualified as transformative even though replicating Campbell's copyrighted logo was not "necessary" for Warhol to comment on consumerism under both *Campbell* and *Google*.

The rule the Government advances, however, accords much better with this Court's fair use precedent. The first fair use factor can be described as an inquiry that seeks "the reasons for copying." *Google*, 141 S. Ct. at 1199. Because fair use is an affirmative defense, AWF bears the burden to prove a permissible "justification for the very act of borrowing." *Campbell*, 510 U.S. at 581. Indeed, in *Campbell*, this Court emphasized that a parody requires "mimic[king] an original to make its point." *Id*. At 580-581. The Government's rule appears explicit in this Court's fair use jurisprudence. The Government explains that the borrowing of the original source material "will often be necessary" or "at least useful" to make the follow-on author's own creative expression "clearer and more effective." OSG Br. 10. The Government argues that AWF failed to provide *any* fair use justification whatsoever. It does not offer guidance on what qualifies as a permissible justification to weigh in favor of fair use, but simply argues that a follow-on author must provide *some* kind of justification when borrowing creative elements from an original source material. This will be a key issue for the Court to address.

The Government and Respondent assert that Petitioner's proposed test makes the holistic fair use approach obsolete and renders the remaining fair use factors superfluous. The copyright law requires a case-by-case analysis of whether

or not a specific use is "fair" based on balancing four factors. However, Petitioner's meaning-or-message test undercuts this holistic approach by treating new meaning as dispositive. Petitioner's test privileges follow-on authors over original creators and thereby ignores the balance between fair compensation for an author's original expression and creative breathing space for innovators. Indeed, Petitioner argues that the Prince Series qualifies as fair use because it undisputedly conveys a distinct meaning or message from Goldsmith's photograph of Prince.

Petitioner's reliance on fair use precedent is misplaced. Both the Government and Respondent repeatedly explain that *Campbell* "cannot fairly be read to hold that any new meaning or message suffices to render a secondary work transformative." OSG Br. 24. Rather, Campbell's reference to meaning was to explain how changing the purpose of a work through a parody can add new meaning to a follow-on work. *Campbell*, 510 U.S. at 579 In *Google*, the Court never suggested that Google changed the meaning or message of Oracle's copyrighted computer code. There, the Court concluded that in copying Oracle's code, Google accomplished a distinct purpose from Oracle by repurposing pre-existing code developed for desktops for smartphones use. Therefore, the Court should not be persuaded by the Petitioner's argument that the transformative inquiry hinges on whether a follow-on author's work "adds something new" to the source material. *Google*, 141 S. Ct. at 1202-03 (*quoting Campbell*, 510 U.S. at 579).

Petitioner's test fails to strike a balance between incentivizing artists to create new work while granting innovators the right to make fair use of copyrighted

material. Under Petitioner's test, derivative work including book-to-movie adaptations or sequels could assert fair use as an affirmative defense simply by adding new meaning or message. Likewise, the photography licensing market would be decimated if Petitioner's meaning-or-message test is adopted. Photographers, both Respondent and the Government contend, rely on licensing reproduction rights. Endorsing Petitioner's meaning-or-message would displace Goldsmith's ability to license her photographs to the same magazines market that Warhol's Prince Series competes in. Consequently, Petitioner's meaning-or-message test is a sweeping expansion of the fair use doctrine that would radically upend the licensing regime.

Dispositive weight should not be given "to subjective impressions of what two works mean." Goldsmith Br. 33. This Court did not forbid considering meaning or message when evaluating the first fair use factor. Meaning or message, both Respondent and the Government concede, can be relevant insofar as it assists the Court in determining what the purpose and character is. But Respondent and the Government agree that Petitioner's unworkable meaning-or-message test can be easily rigged; it provides an avenue for individuals to present self-serving statements to weigh in their favor. For example, the Government argues that relying on subjective intent as central to the transformative-ness inquiry would encourage "competing expert testimony on matters that are ultimately unknowable." OSG Br. 24. By the same token, Respondent argues that the meaning-or-message test is a "battle of opinions" disguised as an objective test.

Specifically, Respondent claims that Goldsmith's purported subjective intent to convey Prince as "vulnerable" was pitted against art critics' opinion that Warhol's "Orange Prince" was "iconic" and a "larger-than-life figure."

Petitioner's meaning-or-message test if adopted would consequently nullify a "creator's rights over derivative works." Goldsmith.Br. 47. This Court should evaluate the practical risks in adopting Petitioner's test. As explained by the Government, "Adobe Photoshop or Instagram filters… readily allow a [follow-on author] to replicate and then alter an image to communicate a new message." OSG Br. 24. If Petitioner's meaning-or-message test is adopted, alterations by these graphic editing platforms would be sufficient to allow follow-on authors to use original work without authorized permission or licensing. Special effect filters that add puppy-like ears or sparkling unicorns to photographs could easily pass the muster of Petitioner's test. If any edited photograph could "reasonably be perceived" as adding some "meaning or message" that the original copyrighted source material lacked, virtually any edited photograph would always be fair use. Pet. Br. 33, 40. These consequences warrant a rejection of Petitioner's test.

Recommendation

I recommend that you vote to affirm. AWF's licensing of the "Orange Prince" to Condé Nast was not a fair use. The Second Circuit correctly observed that the District Court erred in its grant of summary judgment in favor of AWF. Although I believe the Second Circuit reached the proper conclusion, this Court should clarify the proper application of the first factor, "the purpose and character of the use."

In doing so, I respectfully recommend that the Court adopt the Government's fair use justification test, or in the alternative, Respondent's necessity test. The Government's justification test is a lower standard compared to Respondent's necessity test and strikes the correct balance between encouraging creativity by rewarding creators for the fruits of their labor and promoting production by allowing innovators to build on existing creative expression.

But even if this Court adopts a more rigorous test like Respondent's necessity test, the Court should still weigh against a finding of fair use here. Finding in favor of fair use or adopting Petitioner's meaning-or-message test would undermine the copyright licensing regime by rendering it virtually non-existent.

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Prior Judicial Experience

Judicial Internships/Externships	**No**